93-1070

No. _____

Supreme Court, U.S.
FILED
JAN 3 1994
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1993

BOB SKIPPER, SHERIFF OF MULTNOMAH COUNTY,

Petitioner,

v.

KIM REUTER,

Respondent.

Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

STEVEN J. NEMIROW*
Assistant County Counsel
LAURENCE KRESSEL
Multnomah County Counsel
P.O. Box 849
Portland, Oregon 97207
(503) 248-3138

Attorneys for Petitioner

*Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Whether the broad anti-injunction provisions of the Norris-LaGuardia act permit a district court to preliminarily enjoin discharge of a county corrections officer for violating a workrule, in a suit brought by the officer under 42 U.S.C. § 1983?

LIST OF PARTIES

Petitioner (Defendant-Appellant in the Ninth Circuit):

Bob Skipper, in his official capacity as the elected Sheriff of Multnomah County, Oregon.

Respondent (Plaintiff-Appellee in the Ninth Circuit):

Kim Reuter.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

LIST OF PARTIES ii

OPINIONS BELOW 2

JURISDICTION 2

STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE WRIT 5

Virtually every county and municipal employer which seeks to discharge or discipline an employee will be affected by the issue presented in this case: Whether district courts may issue preliminary injunctions in labor disputes over constitutional rights, despite the broad anti-injunction provisions of the Norris-LaGuardia Act 5

1. Labor disputes, including discharge and discipline, that were formerly handled by grievance procedures and binding arbitration under labor agreements, will now be decided in federal courts 5

2. The Ninth Circuit's determination that § 1983 actions are exempt from the Act undermines arbitration 7

3. Congress knows how to create exceptions to the Act, but has chosen not to exempt § 1983 actions; the Ninth Circuit's decision leaves the intent and meaning of the Act in a state of confusion 9

TABLE OF CONTENTS – Continued

Page

4. Whether federal courts may issue preliminary injunctions in public sector labor disputes is an important question of federal jurisdiction.... 11

5. Excluding § 1983 actions profoundly diminishes Norris-LaGuardia, but prohibiting preliminary injunctions in labor disputes does not impair § 1983 12

CONCLUSION 13

LIST OF APPENDICES

APPENDIX A
Order and Amended Opinion of the United States Court of Appeals for the Ninth Circuit, Filed August 27, 1993, Amended October 7, 1993 ..... A-1

APPENDIX B
Order of the United States Court of Appeals for the Ninth Circuit, Filed October 27, 1993 ..... B-1

APPENDIX C
Civil Minutes, United States District Court for the District of Oregon, Dated February 8, 1993..... C-1

APPENDIX D
The Norris-LaGuardia Act, 29 U.S.C. §§ 101-115 (1988) D-1

42 U.S.C. § 1983..... D-3

TABLE OF AUTHORITIES

Page

CASES

Anderson v. Edwards, 505 F. Supp. 1043 (S.D. Ala. 1981) 11

Boys Markets, Inc. v. Retail Clerks Union, 398 U.S. 235 (1970) 8

Brotherhood of RR Trainmen v. Chicago River & Ind. Ry, 353 U.S. 30 (1957) 8

Buffalo Forge v. United Steelworkers of America, 428 U.S. 397 (1976) 7, 13

Camping Construction Co. v. District Council of Iron-workers, 915 F.2d 1333 (9th Cir. 1990) 8

Carter v. Western Reserve Psychiatric Habilitation Center, 767 F.2d 270 (6th Cir. 1985) 10

Castro v. Beecher, 334 F. Supp. 930 (D.C. Mass. 1971) 10

DeLuca v. Sullivan, 450 F. Supp. 736 (D.C. Mass. 1977) 10

Green v. City of Montgomery, 792 F. Supp. 1238 (M.D. Ala. 1992) 10

Laverpool v. New York City Transit Authority, 760 F. Supp. 1046 (E.D.N.Y. 1991) 10

Lake Michigan Col. Fed. of Teachers v. Lake Michigan Comm. Col., 390 F. Supp. 103 (W.D. Mich. 1974), *reversed*, 508 F.2d 1091 (5th Cir. 1975) 11, 12

Marine Cooks & Stewards v. Panama Steamship Co., 362 U.S. 365 (1960) 5

McAdoo v. Lane, 564 F. Supp. 1215 (D.C. Ill. 1983) 10

TABLE OF AUTHORITIES – Continued

Page

Okeson v. Tolley School Dist. No. 25, 570 F. Supp. 408 (D.C.N.D. 1983) 10

Textile Workers Union v. Lincoln Mills, 353 U.S. 448 (1957) 6, 8

United States v. United Mine Workers, 330 U.S. 258 (1947) 11

STATUTORY PROVISIONS

29 U.S.C. § 113(b) 4

42 U.S.C. § 1983 ..... *passim*

42 U.S.C. § 2000e-1 9

42 U.S.C. § 2000e-5(h) 9

42 U.S.C. § 12117(a) 9

No. _____

In The

Supreme Court of the United States

October Term, 1993

BOB SKIPPER, SHERIFF OF MULTNOMAH COUNTY,

Petitioner,

v.

KIM REUTER,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the Opinion and Judgment of the United States Court of Appeals for the Ninth Circuit (filed on August 27, 1993; amended October 7, 1993), which affirmed an Order (dated February 8, 1993) of the United States District Court for the District of Oregon.

OPINIONS BELOW

The Opinion of the Ninth Circuit, as amended, is reported at 4 F.3d 716, and is reprinted herein as Appendix A.

The Order of the United States District Court for the District of Oregon has not been reported. It is reprinted herein as Appendix C.

JURISDICTION

The Opinion and Judgment of the Ninth Circuit were filed August 27, 1993, and amended by order on October 7, 1993. The Ninth Circuit entered an order on October 27, 1993, denying Petitioner's Petition Suggesting for Rehearing (*En Banc*) (*see*, Appendix B). This Court has jurisdiction to review the Judgment and Opinion pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant portions of the following statutes are reprinted herein as Appendix D:

1. The Norris-LaGuardia Act, 29 U.S.C. §§ 101-115 (1988).

2. 42 U.S.C. § 1983.

STATEMENT OF THE CASE

Respondent ("Reuter") is employed as a corrections officer with Multnomah County Sheriff's Office. Her terms and conditions of employment are controlled by a collective bargaining agreement between Petitioner (the "County") and the Multnomah County Corrections Officers Association. Under the agreement, certain work rules have been promulgated. One rule prohibits domestic relationships between officers and ex-inmates who have been imprisoned during the preceding ten years. The rule has been the subject of prior union grievances and arbitrations.

Union representatives were present at the internal investigations of Reuter's rule violation. Reuter admitted she violated the rule by cohabitating with a twice-convicted felon, last sentenced (for armed robbery) in 1985, to 20 years confinement.

The County sought to terminate Reuter's employment. The union intended to grieve her termination once it occurred. When Reuter was informed of the County's intention, she filed this action under 42 U.S.C. § 1983. She sought a temporary restraining order and preliminary injunction to block her discharge, claiming that the rule violated her right to associate in an intimate relationship under the First Amendment and her right to privacy under the Fourteenth.

The district court issued a temporary restraining order. After a hearing, the court issued a preliminary injunction preventing the County from firing Reuter pending the outcome of her § 1983 action. The County appealed, arguing, as it had in the district court, that the

Norris-LaGuardia Act (the "Act") divested the district court of jurisdiction to issue a preliminary injunction in a labor dispute. Reuter argued (1) that her impending termination was not a "labor dispute" under the Act and (2) that the Act did not apply because the County was not a "person participating or interested in a labor dispute," covered by the Act, 29 U.S.C. § 113(b).

The Ninth Circuit agreed with the County that Reuter's impending termination was a labor dispute. It also agreed that the County is a "person" under the Act. However, the Ninth Circuit affirmed the injunction. It ruled, as a matter of first impression, that despite the Act's broad anti-injunction language, injunctions issued under § 1983 constitute a class of exceptions to the Act, where it is appropriate for federal courts to issue injunctions in municipal labor disputes (App. A-1-12). This Petition addresses the Opinion's creation of that class of exemptions to the Act.

REASONS FOR GRANTING THE WRIT

Virtually every county and municipal employer which seeks to discharge or discipline an employee will be affected by the issue presented in this case: Whether district courts may issue preliminary injunctions in labor disputes over constitutional rights, despite the broad anti-injunction provisions of the Norris-LaGuardia Act.

1. Labor disputes, including discharges and discipline, that were formerly handled by grievance procedures and binding arbitration under labor agreements, will now be decided in federal courts.

Contrary to Congress' intent, the Ninth Circuit has injected federal district courts squarely into the arena of local government labor relations. Formerly, county and municipal employers – like private sector employers – were not subject to temporary restraining orders and preliminary injunctions in labor disputes. The Norris-LaGuardia Act was thought to have effectively taken the federal courts *out* of the labor injunction business.[1]

---

[1] "Th[e] Act's language is broad. The language is broad because Congress was intent on taking the federal courts out of the labor injunction business except in the very limited circumstances left open for federal jurisdiction under the Norris-LaGuardia Act. The history and background that led Congress to take this view have been adverted to in a number of prior opinions of this Court in which we refused to give the Act narrow interpretations that would have restored many labor dispute controversies to the courts." *Marine Cooks & Stewards v. Panama Steamship Co.*, 362 U.S. 365, 369 (1960).

Instead, labor disputes have been customarily handled through the grievance and arbitration provisions bargained in collective labor agreements. Local government workers who claimed to be deprived of constitutional rights in their employment were not deprived of a remedy: they could obtain equitable relief in the form of reinstatement and backpay, and damages and attorney fees in actions under 42 U.S.C. § 1983.

The Ninth Circuit's decision throws the law and custom of labor relations into confusion, and dramatically changes the way county and municipal labor disputes will be resolved. Under the Ninth Circuit's decision, employees facing discharge, discipline or any change in working conditions arguably implicating a constitutional right may apply to the district court for a temporary restraining order and preliminary injunction. On petitions for preliminary injunctions, district courts will now make findings of fact on the *merits* of these labor disputes, supplanting labor arbitrators to whom Congress assigned that job, under federal labor law. *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448 (1957). This Court has expressly cautioned against this practice:

> If an injunction could issue against the [labor dispute] in this case, so in proper circumstances could a court enjoin any other alleged breach of contract pending the exhaustion of the applicable grievance and arbitration provisions even though the injunction would otherwise violate one of the express prohibitions of § 4. The court in such cases would be permitted, if the dispute was arbitrable, to hold hearings, make findings of fact, interpret the applicable provisions of the contract, and issue injunctions so as to restore

> the status quo, or to otherwise regulate the relationship of the parties pending exhaustion of the arbitration process. This would cut deeply into the policy of the Norris-LaGuardia Act and make the courts potential participants in a wide range of arbitrable disputes under the many existing and future collective bargaining contracts, not just for the purpose of enforcing promises to arbitrate, * * * , but for the purpose of preliminarily dealing with the merits of the factual and legal issues that are subjects for the arbitrator and of issuing injunctions that would otherwise be forbidden by the Norris-LaGuardia Act. *Buffalo Forge v. United Steelworkers of America*, 428 U.S. 397, 411-412 (1976).

The conflict between *Buffalo Forge* and the instant case could not be more clear. While *Buffalo Forge* involved a strike, in contrast to the contemplated termination in this case, that difference is insignificant in light of the Ninth Circuit's holding that Reuter's termination, like a strike, is a "labor dispute" under the Act.

2. The Ninth Circuit's determination that § 1983 actions are exempt from the Act undermines arbitration.

In prior opinions, this Court has refused to narrow the Act's coverage, citing Congress' intent to take federal courts out of the labor injunction business. However, the Court does recognize a narrow band of exceptions to the Act, where, despite the Act's express prohibitions, federal courts may issue injunctions to encourage the arbitration

of labor disputes. Contrary to the purpose of the recognized exceptions, the Ninth Circuit's determination in this case *undermines* arbitration.

In three types of labor disputes, this Court has found exceptions to the Act's prohibition against injunctions and has extended federal courts' jurisdiction to issue injunctions. The exceptions allow courts to: (1) compel employers to honor their agreements to arbitrate, *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448 (1957); (2) enjoin strikes when unions refuse their contractual commitment to arbitrate, *Boys Markets, Inc. v. Retail Clerks Union*, 398 U.S. 235 (1970); and, (3) compel compliance with specific duties imposed by other federal labor statutes, *Brotherhood of RR Trainmen v. Chicago River & Ind. Ry*, 353 U.S. 30 (1957) (Union's statutory duty to arbitrate "minor disputes" under the Railway Labor Act). The exception for § 1983 actions created by the Ninth Circuit in this case is new.[2] Moreover, it runs counter to the other exceptions which are designed to encourage labor dispute resolution through arbitration.

---

[2] The Ninth Circuit's decision (App. A-10-A-11) inadvertently omits a word in a quotation from *Camping Construction Co. v. District Council of Ironworkers*, 915 F.2d 1333 (9th Cir. 1990), and this omission distorts the breadth of the recognized exceptions. Observing that exceptions to the literal strictures of Norris-LaGuardia are few, it quotes the following passage, but *omits* the term "specifically": "Every such case we have discovered accommodates the Act to a duty specifically imposed by another statute, or to the strong federal policy favoring labor arbitration." 915 F.2d at 1345. Omitting "specifically," the Ninth Circuit mistakenly relies on *Camping* as authority to find an exception for duties that are *not* specifically imposed, but are merely implied by § 1983.

Indeed, where the other Court-created exceptions plainly promote the arbitration of labor disputes, and advance the collective bargaining process in general, the Ninth Circuit's new exception has just the opposite effect: it will undermine the arbitration process by injecting federal courts, before any adverse action is taken against an employee, into innumerable (and often trivial) municipal and county workplace issues. Motions for temporary restraining orders and preliminary injunctions will become the means for adjusting such labor disputes, which formerly would have been settled through grievance procedures and arbitration under collective bargaining agreements.

3. Congress knows how to create exceptions to the Act, but has chosen not to exempt § 1983 actions; the Ninth Circuit's decision leaves the intent and meaning of the Act in a state of confusion.

Congress is aware of its authority to exempt actions from Norris-LaGuardia, and it has exercised that authority. For example, the Civil Rights Acts of 1964 and 1991, 42 U.S.C. § 2000e-1 *et seq.*, prohibit employment discrimination based on an individual's race, color, religion, sex or national origin; however, they expressly exclude application of Norris-LaGuardia. 42 U.S.C. § 2000e-5(h). Similarly, The Americans with Disabilities Act (the "ADA"), which prohibits discrimination based on physical or mental disabilities, has a specific Norris-LaGuardia exclusion. 42 U.S.C. § 12117(a).

Significantly, Congress created the Title VII exemption to Norris-LaGuardia in 1964. Fifteen years later, in

1979, Congress amended § 1983, making *no exception* for the Act. Subsequently, Congress created the ADA's Norris-LaGuardia exclusion in 1990. Implicitly, Congress chose not to create a § 1983 exemption to Norris-LaGuardia when it amended § 1983 in 1979, aware, as it may be, that the all-encompassing nature of § 1983 would vitiate the Act. Without congressional authorization, the Ninth Circuit has manufactured the exemption which Congress declined to make. Such a drastic judicial amendment to the Act deserves this Court's attention.

Virtually any dispute over the terms and conditions of municipal employment can be articulated as a claim of "deprivation of * * * rights, privileges or immunities secured by the constitution."[3] Under the Ninth Circuit's ruling, such claims provide the basis for seeking preliminary injunctive relief in federal court. Yet, the same Ninth Circuit panel, in the same decision, acknowledges that Norris-LaGuardia, which deprives courts of the power to

---

[3] See, e.g., the following sampling of § 1983 actions that could provide a basis for preliminary injunctions under the Ninth Circuit's ruling: *Okeson v. Tolley School Dist. No. 25*, 570 F. Supp. 408 (D.C.N.D. 1983) (breach of contract); *Laverpool v. New York City Transit Authority*, 760 F. Supp. 1046 (E.D.N.Y. 1991) (implementation of drug testing); *Carter v. Western Reserve Psychiatric Habilitation Center*, 767 F.2d 270 (6th Cir. 1985) (denial of posttermination hearing); *Castro v. Beecher*, 334 F. Supp. 930 (D.C.Mass. 1971) (dispute over job requirements); *DeLuca v. Sullivan*, 450 F. Supp. 736 (D.C.Mass. 1977) (failure to promote); *McAdoo v. Lane*, 564 F. Supp. 1215 (D.C.Ill. 1983) (harassment, humiliation and frustration of employee's performance); *Green v. City of Montgomery*, 792 F. Supp. 1238 (M.D.Ala. 1992) (unwarranted discipline, disadvantageous transfer, denial of training and promotion).

issue preliminary injunctions in such disputes, *does apply* to labor disputes involving county and municipal employers. The Ninth Circuit's inconsistency leaves the intent and meaning of the Act in a state of confusion.

4. Whether federal courts may issue preliminary injunctions in public sector labor disputes is an important question of federal jurisdiction.

No other federal Circuit Court has ruled on the relationship between Norris-LaGuardia and § 1983 in public sector labor disputes. Indeed, the Ninth Circuit cited only two district court cases in support of its determination that § 1983 overrides the Act, one of which had been reversed, and both of which are of little persuasive value.

Lake Michigan Col. Fed. of Teachers v. Lake Michigan Comm. Col., 390 F. Supp. 103, 135 (W.D. Mich. 1974), *reversed*, 508 F.2d 1091 (5th Cir. 1975), was cited for the proposition that Congress intended to apply the Fourteenth Amendment to the States in every situation, including public employment disputes in which injunctive relief is appropriate. In fact, the district court in *Lake Michigan*, as well as in *Anderson v. Edwards*, 505 F. Supp. 1043 (S.D. Ala. 1981), the other case upon which the Ninth Circuit relied, found preliminary injunctive relief appropriate on the basis that the *federal government's* exclusion from the Act, established by this Court in *United States v. United Mine Workers*, 330 U.S. 258 (1947), extended to counties and municipalities. However, in its Opinion, the Ninth Circuit expressly rejected the *Mine Workers* rationale. The district courts in neither *Lake Michigan* or *Anderson* necessarily decided whether a labor

dispute over a claim of deprivation of a constitutional right constitutes an exception to Norris-LaGuardia.[4]

5. Excluding § 1983 actions profoundly diminishes Norris-LaGuardia, but prohibiting preliminary injunctions in labor disputes does not impair § 1983.

The question presented is an important one of first impression under Norris-LaGuardia. The Ninth Circuit's unprecedented construction of the Act virtually eliminates its application in any public-sector labor dispute. This might be justifiable if it was necessary to eliminate Norris-LaGuardia's prohibition against preliminary injunctions in labor disputes in order to preserve the remedies available under § 1983, but this is not the case. The remedies available under § 1983 are not threatened by Norris-LaGuardia. Where a municipal or county employee has been deprived of constitutional rights in employment, under § 1983 the employee may be awarded

---

[4] The procedural history of *Lake Michigan* further undermines its authority. The district court issued a temporary restraining order requiring the immediate reinstatement of the plaintiffs, who had been fired for an illegal strike, and who claimed they were denied due process. The Sixth Circuit stayed the order, and then vacated it, 480 F.2d 927 (6th Cir. 1973), "as an abuse of discretion," 518 F.2d at 1094. After a trial, the district court issued an exhaustive opinion granting injunctive relief in the form of reinstatement. 390 F. Supp. 103.

On appeal, the Sixth Circuit reversed and remanded the entire district court decision. The Sixth Circuit did not reach the issue of whether Norris-LaGuardia prohibited preliminary injunctive relief, because *no* relief was granted.

reinstatement, back pay, accrued benefits, seniority, damages, punitive damages, costs and attorney fees, i.e., made whole. Courts need not resort to temporary restraining orders or preliminary injunctions to fill out an otherwise incomplete § 1983 remedial scheme.

The Ninth Circuit's decision in the instant case *will* "cut deeply into the policy of the Norris-LaGuardia Act and make the courts potential participants in a wide range of arbitrable disputes under the many existing and future collective bargaining contracts," as this Court cautioned *against* in *Buffalo Forge*. But Norris LaGuardia need *not* be sacrificed to preserve threatened remedies under § 1983.

CONCLUSION

For these reasons, this petition for certiorari should be granted. The Ninth Circuit's Opinion should be reviewed and reversed by this Court.

Dated: December 30, 1993.

Respectfully submitted,

STEVEN J. NEMIROW*
Assistant County Counsel

LAURENCE KRESSEL
Multnomah County Counsel

Attorneys for Petitioners

*Counsel of Record

APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

KIM REUTER, Plaintiff-Appellee, v. BOB SKIPPER, Defendant-Appellant.	)	No. 93-35140 D.C. No. CV-92-1622-JAR ORDER AND AMENDED OPINION

Appeal from the United States District Court
for the District of Oregon
James A. Redden, District Judge, Presiding

Submitted July 15, 1993*****
Portland, Oregon

Filed August 27, 1993
Amended October 7, 1993

Before: Alfred T. Goodwin, Jerome Farris and David R. Thompson, Circuit Judges.

Opinion by Judge Thompson

***** The panel unanimously finds this case suitable for disposition without oral argument. Fed. R. App. 34(a); 9th Cir. R. 34-4.

SUMMARY

Labor and Employment/Individual Rights

The court of appeals affirmed an order of the district court. The court held that the Norris-LaGuardia Act of 1932 did not preclude the issuance of an injunction pursuant to 42 U.S.C. Section 1983 against a municipal corporation involved in a labor dispute.

Appellee Kim Reuter was fired from her position as a corrections officer for Multnomah County, Oregon, for cohabiting with a felon on parole from state prison in violation of a work rule promulgated pursuant to the collective bargaining agreement under which she worked. Reuter sued under Section 1983 for violation of the First and Fourteenth Amendments. The district court issued a preliminary injunction prohibiting the County from discharging her pending resolution of her civil rights action. Contending that Norris-LaGuardia, which applied to persons participating in a labor dispute, prohibited the issuance of a federal injunction in the premises, the County appealed.

[1] The work rule applied to Reuter was directly related to the terms and conditions of her employment and the remedy for its violation was her discharge. The circumstances were thus a labor dispute under Norris-LaGuardia.

[2] Under Oregon law, the County was a body politic and corporate. Nothing in the legislative history of Norris-LaGuardia suggested that the statute was not

intended to apply to the County. [3] Further, holding a municipality to be excluded from Norris-LaGuardia's proscription of injunctions under case law dealing with the sovereignty of state governments was inconsistent with Supreme Court holdings that municipal corporations are persons subject to suit under Section 1983. [4] Moreover, the Congressional definition of person that was effective when both the Civil Rights Act of 1871 and Norris-LaGuardia were enacted included bodies politic and corporate. Omission of bodies politic and corporate from the broader definition of person that Congress enacted in 1948 did not indicate an intention to exclude municipal corporations from Norris-LaGuardia.

[5] Nonetheless, Reuter's action was based on a statute that was excepted from the anti-injunction provisions of Norris-LaGuardia, [6] since Section 1983's central purpose was to provide relief from the deprivation of federally secured rights by government.

COUNSEL

Steven J. Nemirow, Assistant County Counsel, Multnomah County, Portland, Oregon, for defendant-appellant.

Spencer M. Neal, Ginsburg & Neal, Portland, Oregon, for plaintiff-appellee.

ORDER

The opinion filed August 27, 1993 is amended by deleting the last sentence of the third full paragraph at slip op. 9205. The deleted sentence begins: "If, in a labor dispute. . . . "

OPINION

THOMPSON, Circuit Judge:

The Sheriff of Multnomah County, Bob Skipper (hereinafter "the County"), appeals a preliminary injunction granted by the district court enjoining the County from firing Kim Reuter during the pendency of her action brought under 42 U.S.C. § 1983. Reuter worked for the County as a County Corrections Officer. She was fired because she violated a rule which prohibited cohabitation between a corrections officer and an ex-felon.

The County contends this case involves a labor dispute and the district court was precluded from issuing the preliminary injunction by the Norris-LaGuardia Act of 1932 ("Norris-LaGuardia"), 29 U.S.C. §§ 101-115 (1988). The merits of the injunction are not contested. We have jurisdiction under 29 U.S.C. § 110. We affirm the district court's grant of the preliminary injunction.

I

BACKGROUND

Pursuant to a collective bargaining agreement between the County and the Multnomah County Corrections Officers Association, the officers' union, the County

promulgated work rules for corrections officers. One work rule prohibited certain relationships between corrections officers and ex-felons who had been imprisoned anytime in the preceding ten years. Reuter admits she violated this rule by cohabitating with an ex-felon on parole from state prison.

The County sought to discharge Reuter for violating the rule. It asserted that Reuter's relationship posed a security risk and also reflected unfavorably upon the Sheriff's Department. When Reuter was informed of the County's intention to discharge her, she filed this action under 42 U.S.C. § 1983 and sought a temporary restraining order and preliminary injunction to block her discharge. She contended that the County's work rule violated her right to associate in an intimate relationship under the First Amendment and her right to privacy under the Fourteenth Amendment.

The district court issued a temporary restraining order. After a hearing, the court issued a preliminary injunction preventing the County from firing Reuter pending the outcome of her section 1983 action. The County appeals.

II

DISCUSSION

Norris-LaGuardia prohibits any federal court from issuing an injunction in almost any "labor dispute." *See Camping Constr. Co. v. District Council of Iron Workers*, 915 F.2d 1333, 1343-49 (9th Cir. 1990) (discussing limited scenarios in which Norris-LaGuardia has been held not to

bar injunctive relief) *cert. denied*, 111 S. Ct. 1684 *and cert. denied*, 111 S. Ct. 2260. If Norris-LaGuardia applies here, an injunction is improper under 29 U.S.C. § 104(a) ("No court of the United States shall have jurisdiction to issue any restraining order or . . . injunction . . . to prohibit any person or persons . . . from: . . . (a) Ceasing or refusing to perform any work or to remain in any relation of employment.").

Norris-LaGuardia applies only to "person[s] participating or interested in a labor dispute." 29 U.S.C. § 113(b); *see also id.* at §§ 104, 105 & 113(a). Norris-LaGuardia does not specify whether a "person" includes a county.

The issue we must decide is whether the Norris-LaGuardia Act applies in this case to preclude the preliminary injunction which the district court issued. The Act applies if Reuter's section 1983 action is a "labor dispute," the County is a "person" within the meaning of the Act, and Reuter's action is not accepted from the anti-injunction provisions of the Act.

A. Labor Dispute

Section 110 of the Act provides:

> Whenever any court of the United States shall issue or deny any temporary injunction in a case involving or growing out of a labor dispute, the court shall, upon the request of any party to the proceedings and on his filing the usual bond for costs, forthwith certify as in ordinary cases the record of the case to the court of appeals for its review. Upon the filing of such record in the court of appeals, the appeal shall

> be heard and the temporary injunctive order affirmed, modified or set aside expeditiously.

29 U.S.C. § 110.

A " 'labor dispute' includes any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing or seeking to arrange terms or conditions of employment, regardless of whether or not the disputants stand in the proximate relation of employer and employee." 29 U.S.C. § 113(c). The definition of "labor dispute" in Norris-LaGuardia is "extraordinarily broad." *See Camping Constr. Co.*, 915 F.2d at 1342-43. Here, Reuter is threatened with discharge for violating a work rule, which is a "term[] or condition of employment." 29 U.S.C. § 113(c).

Reuter contends her dispute with the County presents a constitutional question rather than an employment question. She argues that because her action is founded upon an alleged constitutional violation under section 1983, her case is not a "labor dispute" within the meaning of Norris-LaGuardia. *See Bowman v. Township of Pennsauken*, 709 F. Supp. 1329, 1336 (D.N.J. 1989) (holding that a section 1983 claim by police officers against the Township was not a labor dispute under Norris-LaGuardia).

[1] We reject this argument. The rule Reuter violated is directly related to the terms and conditions of her employment with the County. The County's remedy for a violation of the rule is discharge. Under Norris-LaGuardia's "broad" definition, this is a labor dispute.

B. The County As a "Person"

Norris-LaGuardia applies only to *"person[s]* participating or interested in a labor dispute." 29 U.S.C. § 113(b) (emphasis added); *see also id.* at §§ 104, 105; & 113(a). Relying on *United States v. United Mine Workers of Am.*, 330 U.S. 258, 289 (1947), Reuter argues that the County is not a "person" under Norris-LaGuardia. We disagree.

Mine Workers is inapposite. There, the Court reasoned that the general term, "person," used in Norris-LaGuardia could not be applied to a sovereign government without express words to that effect. *Id.* at 272. The Court also examined the legislative history of Norris-LaGuardia and determined that Congress intended that the federal government would be exempt from its provisions. *Id.* at 275-76.

[2] The County is not a "sovereign," but rather a "body politic and corporate." *See* Or. Rev. Stat. § 203.010 (1991) ("Each county is a body politic and corporate"); *see also The Eureka*, 80 F.2d 303, 304 (9th Cir. 1935) (describing Multnomah County as "a municipal corporation and body politic"); *Coos County v. Oregon*, 734 P.2d 1348, 1352 (Or. 1987) ("Counties have existed in corporate form with the power to sue and be sued since before statehood."). Nothing in the legislative history of Norris-LaGuardia suggests that the statute was not intended to apply to a county.

We are mindful that some district courts have excluded municipalities and subdivisions of state government from Norris-LaGuardia's proscription against the issuance of injunctions, and have done so by relying on *Mine Workers*. *See Anderson v. Edwards*, 505 F. Supp. 1043,

1047 (S.D. Ala. 1981) (extending *Mine Workers* in order to enjoin the City of Mobile from restricting the public speech of its firefighters); *Lake Michigan College Fed'n of Teachers v. Lake Michigan Community College*, 390 F. Supp. 103, 135 (W.D. Mich. 1974), *rev'd on other grounds*, 518 F.2d 1091 (6th Cir. 1975), *cert. denied*, 427 U.S. 904 (1976) (extending *Mine Workers* in order to reinstate teachers who were fired without a hearing after going on strike).

[3] These decisions are inconsistent with the definition of "person" adopted by the Supreme Court in 42 U.S.C. § 1983 cases. The Court has held that municipal corporations are "persons" subject to suit under section 1983. *Monell v. Department of Social Servs.*, 436 U.S. 658 (1978). In contrast, sovereign states are not considered "persons" under section 1983. *Will v. Michigan Dep't of State Police*, 491 U.S. 58 (1989).

[4] Additionally, the history of the Dictionary Act, 1 U.S.C. § 1 (1988), supports the County's contention that it is a "person" under Norris-LaGuardia. Only months before Congress enacted the Civil Rights Act of 1871, on which Reuter's section 1983 action is predicated, it adopted the Dictionary Act. *See Monnell*, 436 U.S. at 688 (citing Act of Feb. 25, 1871, § 2, 16 Stat. 431). That Act provided that the word "person" would include "bodies politic and corporate," meaning municipal corporations such as the County. *Id.* The definition in use in 1871 was still in use in 1932, when Congress enacted Norris-LaGuardia. Congress amended the Dictionary Act in 1948 and inserted a broader definition of "person," including "corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals." 1 U.S.C. § 1. This amendment, although it

omits "bodies politic and corporate" from the definition, does not indicate that Congress intended to exclude municipal corporations from coverage under Norris-LaGuardia. Indeed, the Supreme Court has held that the requirements of federal statutes are to be imposed on the states, as well as their subdivisions, unless the states or their subdivisions are specifically exempted from the Congressional mandate. *See Garcia v. San Antonio Metro. Transit Auth.*, 469 US. 528, 552-53 (1985) (overruling *National League of Cities v. Usery*, 426 U.S. 833 (1976)); *see also California v. Taylor*, 353 U.S. 553, 564-65 (1957) ("When Congress wished to exclude state employees [from federal labor laws], it expressly so provided. Its failure to do likewise in the Railway Labor Act indicates a purpose not to exclude state employees.").

We hold that the County is a "person" under Norris-LaGuardia.

C. Reuter's Section 1983 Action Excepted From Norris-LaGuardia

Despite the broad anti-injunction language of Norris-LaGuardia, a narrow band of labor disputes exists in which it is appropriate for a federal court to issue a restraining order or an injunction. Reuter contends that injunctions issued in actions brought under 42 U.S.C. § 1983 are within this exception. We agree.

The exceptions to the literal strictures of Norris-LaGuardia are few. "Every such case we have discovered accommodates the [Norris-LaGuardia] Act either to a duty imposed by another statute, or to the strong federal policy favoring labor arbitration." *Camping Constr. Co.*,

915 F.2d at 1345 (citations omitted). "Exceptions to Norris-LaGuardia are limited by this principle." *Id.*

[5] Reuter's section 1983 action falls into the limited category of statutes excepted from the anti-injunction provisions of Norris-LaGuardia. Section 1983 imposes a duty on a person acting under color of state law not to deprive another person "of any rights, privileges or immunities secured by the Constitution and laws." 42 U.S.C. § 1983 (1988). Section 1983 provides the injured person with the broadest possible array of remedies: "an action in law, suit in equity, or other proper proceeding for redress." *Id.*

[6] It would be incongruous to read Norris-LaGuardia to preclude equitable relief as a remedy available to the injured party under section 1983 just because the parties are involved in a labor dispute. The central purpose of section 1983 is to provide compensatory relief to those deprived of their federal rights by governmental bodies. *Felder v. Casey*, 487 U.S. 131, 141 (1987).

We hold that Norris-LaGuardia does not deny a plaintiff in a labor dispute, who has a meritorious constitutional claim under section 1983, any of her available remedies. *See Lake Michigan College*, 390 F. Supp. at 135 ("the court can find no evidence that Congress intended to apply the Fourteenth Amendment to the states in every situation except public employment disputes in which injunctive relief is appropriate."); *see also Anderson*, 505 F. Supp. at 1047 (same).

Our holding does not interfere with the purposes of Norris-LaGuardia. Norris-LaGuardia was intended to protect workers from federal court injunctions so as to

allow them to exercise organized economic power. *See* 29 U.S.C. § 102; *Matter of Crowe & Assocs., Inc.*, 713 F.2d 211, 216 (6th Cir. 1983). If a constitutional right is violated in a labor dispute between a municipal government and its employee, the section 1983 claim will invariably be made by the employee. An injunction issued against the municipality in such circumstances does not interfere with the policy aims of Norris-LaGuardia.

The County does not challenge the merits of the preliminary injunction, only the district court's power to issue it. We conclude that when all of the requirements for equitable relief under section 1983 have been met, Norris-LaGuardia does not preclude the district court from issuing an injunction in a section 1983 action, even though the action involves a labor dispute between an employee and a municipality.

AFFIRMED.

APPENDIX B

FILED OCT 27 1993

CATHY A. CATTERSON, CLERK

U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

KIM REUTER, Plaintiff-Appellee, v. BOB SKIPPER, Defendant-Appellant.	No. 93-35140 D.C. No. CV-92-1622-JAR ORDER

Before: GOODWIN, FARRIS and THOMPSON, Circuit Judges.

The panel, as constituted above, has unanimously voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for en banc rehearing and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is DENIED, and the suggestion for a rehearing en banc is REJECTED.

APPENDIX C

UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

CIVIL MINUTES

Case No.: *Civil 92-1622-RE* Date of Proceeding: *February 8, 1993*

Case Title: *Reuter v. Skipper*

Courtroom Deputy: *Ingrid Campbell*

Reporter: *Jerry Harris*

DOCKET ENTRY:

Pursuant to oral argument held on these motions on February 5, 1993: Defendant's Motion to Dissolve Temporary Restraining Order and for Costs and Fees (doc. #6) is denied, and Plaintiff's motion for Preliminary Injunction (doc. #10) is granted. Further, Defendant's Supplemental Brief in Opposition to Preliminary Injunction (doc. #13) is considered as a Motion for Summary Judgment. Plaintiff's Response is due March 5, 1993. Defendant's Reply is due March 19, 1993. Oral argument will be April 5, 1993 at 10:00 am in courtroom no. 62.

PLAINTIFF'S COUNSEL	**DEFENDANT'S COUNSEL**
Spencer Neal	Steven Nemirow

cc: { } All counsel

Document No:___

Civil Minutes

Honorable James A. Redden

APPENDIX D

29 U.S.C. § 101. Issuance of restraining orders and injunctions; limitation; public policy

No court of the United States, as defined in this chapter, shall have jurisdiction to issue any restraining order or temporary or permanent injunction in a case involving or growing out of a labor dispute, except in a strict conformity with the provisions of this chapter; nor shall any such restraining order or temporary or permanent injunction be issued contrary to the public policy declared in this chapter.

§ 104. Enumeration of specific acts not subject to restraining orders or injunctions

No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute (as these terms are herein defined) from doing, whether singly or in concert, any of the following acts:

(a) Ceasing or refusing to perform any work or to remain in any relation of employment;

(b) Becoming or remaining a member of any labor organization or of any employer organization, regardless of any such undertaking or promise as is described in section 103 of this title;

(c) Paying or giving to, or withholding from, any person participating or interested in such labor dispute,

any strike or unemployment benefits or insurance, or other moneys or things of value;

(d) By all lawful means aiding any person participating or interested in any labor dispute who is being proceeded against in, or is prosecuting, any action or suit in any court of the United States or of any State;

(e) Giving publicity to the existence of, or the facts involved in, any labor dispute, whether by advertising, speaking, patrolling, or by any other method not involving fraud or violence;

(f) Assembling peaceably to act or to organize to act in promotion of their interests in a labor dispute;

(g) Advising or notifying any person of an intention to do any of the acts heretofore specified;

(h) Agreeing with other persons to do or not to do any of the acts heretofore specified; and

(i) Advising, urging, or otherwise causing or inducing without fraud or violence the acts heretofore specified, regardless of any such undertaking or promise as is described in section 103 of this title.

§ 108. Noncompliance with obligations involved in labor disputes or failure to settle by negotiation or arbitration as preventing injunctive relief

No restraining order or injunctive relief shall be granted to any complainant who has failed to comply with any obligation imposed by law which is involved in the labor dispute in question, or who has failed to make every reasonable effort to settle such dispute either by

negotiation or with the aid of any available governmental machinery of mediation or voluntary arbitration.

42 U.S.C. § 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

No. 93-1070

Supreme Court, U.S.
FILED
MAR 14 1994
OFFICE OF THE CLERK

IN THE SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1993

BOB SKIPPER, SHERIFF OF
MULTNOMAH COUNTY,

Petitioner,

v.

KIM REUTER,

Respondent.

On Petition for a Writ of Certiorari
To the United States Court of Appeals
For the Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

SANFORD JAY ROSEN
Counsel of Record
THOMAS NOLAN
ROSEN, BIEN & ASARO
155 Montgomery Street, 8th Floor
San Francisco, California 94104
Telephone: (415) 433-6830

SPENCER M. NEAL
GINSBURG & NEAL
500 Yamhill Plaza Building
815 S.W. Second Avenue
Portland, Oregon 97204
Telephone: (501) 221-1792

Attorneys for Respondent

QUESTION PRESENTED FOR REVIEW

May a defendant County official invoke the anti-injunction provisions of the Norris-LaGuardia Act to deny a public sector employee the 42 U.S.C. § 1983 remedy of a "temporary" injunction to maintain the *status quo* in a lawsuit challenging a violation of constitutional rights?

PARTIES TO THE PROCEEDINGS BELOW

The Petitioner (Defendant-Appellant in the Ninth Circuit) is Bob Skipper, in his official capacity as the elected Sheriff of Multnomah County, Oregon.

The Respondent (Plaintiff-Appellee in the Ninth Circuit) is Kim Reuter.

TABLE OF CONTENTS

Page

QUESTION PRESENTED FOR REVIEW i

PARTIES TO THE PROCEEDINGS BELOW ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTION 2

RELEVANT STATUTORY PROVISIONS 2

STATEMENT OF THE CASE 3

REASONS WHY THE PETITION SHOULD BE DENIED 6

Introduction 6

I. THE COURT SHOULD DENY THE PETITION BECAUSE THE ISSUE PRESENTED IS NOW MOOT AND HAS BEEN ABANDONED. 7

TABLE OF CONTENTS

Page

II. THE COURT SHOULD DENY THE PETITION BECAUSE THERE IS NO CONFLICT AMONG THE CIRCUITS AND THE CASE RAISES NO IMPORTANT UNRESOLVED AND RECURRING QUESTIONS OF FEDERAL LAW 11

III. THE COURT SHOULD DENY THE PETITION BECAUSE THE NINTH CIRCUIT DECISION BELOW DOES NOT CONFLICT WITH DECISIONS OF THIS COURT 13

IV. THE COURT SHOULD DENY THE PETITION BECAUSE THE DECISION BELOW DOES NOT IMPLICATE THE POLICY FAVORING ARBITRATION, RESPECTS THE PRINCIPLE THAT SECTION 1983 PLAINTIFFS NEED NOT EXHAUST OTHER REMEDIES PRIOR TO SUIT, AND WILL NOT ENCOURAGE OR INCREASE LITIGATION IN FEDERAL COURTS. 24

CONCLUSION 27

TABLE OF AUTHORITIES

CASES

Page

Alexander v. Gardner-Denver,
415 U.S. 36 (1974) 24, 25

Anderson v. Edwards,
505 F.Supp. 1043 (S.D. Ala. 1981) 12

Bowman v. Township of Pennsauken,
709 F.Supp. 1329 (D.N.J. 1989) 12

Brookens v. White,
795 F.2d 178 (D.C. Cir. 1986) 11

Brotherhood of Railroad Trainmen v. Howard,
343 U.S. 768 (1952) 12, 22

C.A. May Marine Supply Company v. Brunswick Corporation,
649 F.2d 1049 (5th Cir.),
cert. denied, 454 U.S. 1125 (1981) 10

Casella v. Webb,
883 F.2d 805 (9th Cir. 1989) 10

Certified Grocers of Illinois, Inc. v. Produce Etc. Union, Local 703,
816 F.2d 329 (7th Cir. 1987) 8, 9

Collins v. Harker Heights, Texas,
504 U.S. ___, 117 L.Ed.2d 261 (1992) . 15, 24

Cone Corp. v. Hillsborough County,
908 F.2d 908 (11th Cir.),
cert. denied, 498 U.S. 983 (1990) 8

Continental Training Services, Inc. v. Cavazos,
893 F.2d 877 (7th Cir. 1990) 8

Dandridge v. Williams,
397 U.S. 471 (1970) 17

Dayton Board of Education v. Brinkman,
433 U.S. 406 (1977) 17

Denholm v. Houghton Mifflin,
912 F.2d 357 (9th Cir. 1990),
cert. denied, ___ U.S. ___,
115 L.Ed.2d 986 (1991) 10

Dennis v. Higgins,
498 U.S. 439 (1991) 13

Director, Division of Employment Relations v. Labor Relations Commission,
346 N.E.2d 852 (Mass. 1976) 18, 19

Felder v. Casey,
487 U.S. 131 (1988) 26

Gilmer v. Interstate/Jahnson Lane,
500 U.S. 20 (1991) 25

Golden State Transit Corp. v. Los Angeles,
493 U.S. 103 (1989) 8, 13

Graham v. Brotherhood of Locomotive Firemen & Enginemen,
338 U.S. 232 (1949) 12, 22, 23

Lake Michigan College Federation of Teachers v. Lake Michigan Community College,
390 F.Supp. 103 (W.D. Mich. 1974),
rev'd on other grounds,
518 F.2d 1091 (6th Cir. 1975) 11, 20

Mitchum v. Foster,
407 U.S. 225 (1972) 13

Monell v. New York City Dept. of Social Services,
436 U.S. 658 (1978) 13

Monroe v. Pape,
365 U.S. 167 (1961) 14, 26

New York State Nat. Organization for Women v. Terry,
886 F.2d 1339 (2nd Cir. 1989),
cert. denied, 495 U.S. 947 (1990) 7

Patsy v. Board of Regents,
457 U.S. 496 (1982) 26

Reuter v. Skipper,
4 F.3d 716 (9th Cir. 1993) . . . . . *passim*

Roberts v. College of the Desert,
870 F.2d 1411 (9th Cir. 1988) 10

Securities and Exchange Comm'n v. First Financial Group of Texas,
645 F.2d 429 (5th Cir. 1981) 8

Singleton v. Wulff,
428 U.S. 106 (1976) 11

Smith v. Illinois Bell,
270 U.S. 587 (1926) 8

Stacy G v. Pasadena Independent School District,
695 F.2d 949 (5th Cir. 1983) 9

Syres v. Oil Workers International Union,
350 U.S. 892 (1955) 22

Textile Workers Union v. Lincoln Mills,
353 U.S. 448 (1957) 21, 24

United States v. City of Chicago,
534 F.2d 708 (7th Cir. 1976) 8

United States v. Local 30,
871 F.2d 401 (3rd Cir.),
cert. denied, 493 U.S. 953 (1989) 8

United States v. United Mine Workers,
330 U.S. 258 (1947) . . . . . *passim*

United States v. W.T. Grant Co.,
345 U.S. 629 (1953) 11

Virginia Railway Co v. System Federation, R.E.D.,
300 U.S. 515 (1937) 22

Weinstein v. Bradford,
423 U.S. 147 (1975) 11

STATUTES

28 U.S.C. Section 1254(1) 2, 9

28 U.S.C. Section 2283 14

Norris-LaGuardia Act,
29 U.S.C. Section 101 *et seq.* . . . . . *passim*

42 U.S.C. Section 1983 . . . . . *passim*

Labor Management Relations Act of 1947,
29 U.S.C. Section 185 21

LAW REVIEW ARTICLES

Anderson, *Strikes and Impasse Resolution in Public Employment*, 67 Mich. L.R. 943 (1961) . . . . . 19.

Note, *The New Federal Law of Labor Injunctions*, 79 Yale L.J. 1593 (1970) 16

No. 93-1070

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

BOB SKIPPER, SHERIFF OF MULTNOMAH COUNTY,

Petitioner,

v.

KIM REUTER,

Respondent.

On Petition for a Writ of Certiorari To the United States Court of Appeals For the Ninth Circuit

---

RESPONDENT'S BRIEF IN OPPOSITION

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Ninth Circuit, as amended, is reported as *Reuter v. Skipper*, 4 F.3d 716 (9th Cir. 1993), and can also be found as Appendix A to the Petition for Writ of Certiorari.

The District Court's February 8, 1993 Order granting Plaintiff's (Respondent's) motion for a preliminary

injunction is not reported. A copy of the Order is attached as Appendix C to the Petition for Writ of Certiorari.

A copy of the Ninth Circuit Court of Appeal's October 27, 1993 Order denying the County Sheriff's Petition for Rehearing and Suggestion of Rehearing *En Banc* is attached as Appendix B to the Petition for Writ of Certiorari.

The District Court's August 24, 1993 Order, granting Respondent's motion for partial summary judgment, is also not reported. A copy of the Order is attached to this Brief in Opposition in the Appendix at A-1. A copy of the District Court's August 24, 1993 unreported opinion is attached to this Brief in Opposition in the Appendix at A-2 to A-15. A copy of the District Court's October 12, 1993 Declaratory Judgment and Permanent Injunction, enjoining petitioner from enforcing the work rule at issue in this case is attached to this Brief in Opposition in the Appendix at A-16 to A-17.

JURISDICTION

Petitioner invokes this Court's *certiorari* jurisdiction under 28 U.S.C. § 1254(1). Respondent does not dispute the Petition's timeliness. However, as set forth below, Respondent contends the issue is both moot and abandoned.

RELEVANT STATUTORY PROVISIONS

Respondent adopts Petitioner's statement of Relevant Statutory Provisions.

STATEMENT OF THE CASE

Respondent Kim Reuter ("Reuter" or "Respondent") is currently employed as a corrections officer with the Multnomah County Sheriff's Office, a position she has held for more than seven years. (Ninth Circuit Excerpt of Record ["ER"] 13).

In the Fall of 1991, Ms. Reuter began dating a man. During the course of the relationship, Reuter learned that the man had at one time been an inmate in another state. (ER 14, 36, 37). Reuter was aware that under the work rules of the sheriff's office in effect at that time, she was required to report her intimate association with *any* "ex-inmate" to her supervisors. Reuter did so, at first orally and then in writing in a report dated October 18, 1991. (ER 14).

Following her October 1991 report, a member of the sheriff's office investigated Reuter's relationship. (ER 14). Reuter was not told to terminate the relationship. She also was not then subjected to discipline of any kind. (ER 14). She requested that if there was a problem with her relationship, she be informed in writing to that effect. (ER 14). As no such writing was given to her, Reuter assumed that her association with the ex-inmate was not prohibited. (ER 14).

In October 1992, after the relationship had deepened in importance, it was once again investigated by the sheriff's office. (ER 15). On October 20, 1992, Reuter was summarily suspended with pay from her employment at the sheriff's office because of the relationship. (ER 15). On December 17, 1992, Reuter met with the Facilities Division Commander, who advised her that, in light of her intention to continue her relationship, he was going to recommend that her employment with the Sheriff's office

be terminated. (ER 16). He also gave Ms. Reuter the impression that if she stopped associating with her domestic partner, he would recommend that she not be terminated. (ER 16).

Respondent brought suit under 42 U.S.C. § 1983 seeking declarations (1) that her intimate association is protected by the First Amendment to the United States Constitution, and (2) that the work rule barring such associations is constitutionally overbroad. Respondent also sought a temporary restraining order, a preliminary injunction, and a permanent injunction restraining defendant from terminating her employment as a correctional officer. (ER 11).

The district court issued a temporary restraining order. After a hearing, the district court issued a preliminary injunction preventing the County from firing Reuter pending the outcome of her section 1983 action.

The County sheriff appealed, arguing only that the Norris-LaGuardia Act (sometimes "the Act") divested the district court of jurisdiction to issue a preliminary injunction. The sheriff did not argue that the work rule was constitutional or offer any alternative grounds for his assertion that a preliminary injunction was inappropriate.

Before the Ninth Circuit, Reuter argued (1) that her impending termination was not a "labor dispute" under the Act; (2) that the Act did not apply because the County was not a "person participating or interested in a labor dispute," covered by the Act, 29 U.S.C. §113(b); (3) that the Act was enacted to address problems between private employers and their employees and does not apply in the public employment context; and (4) that 42 U.S.C. § 1983, the Civil Rights Act of 1871, as amended, which only applies to persons acting under color of state law, grants to the

district court the power to issue an injunction in order to protect plaintiff's constitutional rights, a power that must be accommodated despite Norris-LaGuardia.

On August 27, 1993, the Ninth Circuit sustained the preliminary injunction, holding that section 1983 injunctions are part of a narrow category of exceptions to the Norris-LaGuardia Act's anti-injunction proscriptions. Pet. App. at A-10 to A-11; *Reuter v. Skipper*, 4 F.3d 716, 719-720 (9th Cir. 1993). In the decision, the panel rejected Respondent's first two arguments (that the impending termination was not a "labor dispute" under the Act and that the County was not a "person" under the Act). However, the panel ruled that "Reuter's section 1983 action falls into the limited category of statutes exempted from the anti-injunction provisions of Norris-LaGuardia." Pet. App. at A-11, 4 F.3d at 720.

Petitioner's timely Petition for Rehearing/Suggestion for Rehearing *En Banc* was denied on October 27, 1993, with the panel of judges voting to deny it and no active judge requesting a vote. Pet. App. at B-1.

On August 24, 1993, the district court issued an order and opinion granting Reuter's motion for partial summary judgment. *See* App. hereto at A-1 to A-15, *infra*. On October 12, 1993, the district court dissolved the preliminary injunction by issuing a declaratory judgment and permanent injunction barring the County from firing Reuter as a result of her intimate association and from otherwise enforcing the work rule under which Reuter had initially been suspended. *See* App. hereto at A-16 to A-17, *infra*.

On September 23, 1993, Petitioner filed a new appeal, this time from the August 24, 1993 Order. Ms. Reuter's brief as appellee in the second appeal is about to

be filed in the Court of Appeals. No Notice of Appeal was filed after or from the October 12, 1993 declaratory judgment and permanent injunction.

REASONS WHY THE PETITION SHOULD BE DENIED

Introduction

There is no reason for the Court to review the issue presented here. First, since the preliminary injunction is no longer in place, and since Petitioner has not appealed from the October 12, 1993 permanent injunction, or even raised the Norris-LaGuardia issue in his appeal from the district court's August 24, 1993 partial summary judgment Order, the issue presented in this appeal is now moot and has been abandoned by Petitioner.

Second, no conflict with any of this Court's decisions is direct and readily apparent from the Ninth Circuit rationale or result. Nor is there any conflict between the Ninth Circuit's decision and the decisions of any other circuit. Indeed, the few reported decisions on this subject are district court decisions, all of which are in accord with the Ninth Circuit's decision here.

Third, this case does not raise an important recurring question of federal law that has not been but ought to be resolved by this Court. The scant number of reported decisions demonstrates the extreme rarity of the issue.

Fourth, as shown herein, the issues involved do not play out in an otherwise significant way. Petitioner engages an imaginative attempt to invoke the broad anti-injunction provisions of the Norris-LaGuardia act to deny certain equitable remedies to public employees who assert precious constitutional rights against municipalities pursuant

to 42 U.S.C. § 1983. However, this case is only about the range of remedies available to such section 1983 litigants -- not about the viability of public sector employees' section 1983 claims. For that reason, and others discussed below, the case does not meaningfully implicate the judicial and social policy favoring the use of binding arbitration to settle labor disputes. Moreover, there is no exhaustion requirement in section 1983 cases; imposition of one in favor of arbitration is not appropriate.

I.

THE COURT SHOULD DENY THE PETITION BECAUSE THE ISSUE PRESENTED IS NOW MOOT AND HAS BEEN ABANDONED.

The preliminary injunction challenged in this appeal is no longer in place. Six weeks after the Ninth Circuit issued its opinion below, the preliminary injunction was dissolved and replaced by a permanent injunction, rendering the issue in the current proceeding moot. *See* District Court's October 12, 1993 Order, App. at A-16 to A-17, *infra*. Petitioner has not appealed from the permanent injunction, thus effectively abandoning the issue presented here.

It is well established that a "temporary" injunction is merged with an order granting a permanent injunction. *Smith v. Illinois Bell*, 270 U.S. 587, 588 (1926); *United States v. City of Chicago*, 534 F.2d 708, 711 (7th Cir. 1976). Following such merger any appeal from the preliminary injunction becomes moot and "appeal is only proper from the order granting the permanent injunction." *United States v. Local 30*, 871 F.2d 401, 403 (3rd Cir.), *cert. denied*, 493 U.S. 953 (1989); *New York State Nat'l*

Organization for Women v. Terry, 886 F.2d 1339, 1350 (2d Cir. 1989), *cert. denied*, 495 U.S. 947 (1990) ("the appealability of the district court's grant of a preliminary injunction is moot . . . because the district court subsequently granted a permanent injunction."); *Cone Corp. v. Hillsborough County*, 908 F.2d 908, 912 n.5 (11th Cir. 1990) (upon entry of a permanent injunction that supersedes a preliminary injunction, appeal from the preliminary injunction is properly dismissed); *Continental Training Servs., Inc. v. Cavazos*, 893 F.2d 877, 880 (7th Cir. 1990) (same); *Securities and Exchange Comm'n v. First Financial Group*, 645 F.2d 429, 433 (5th Cir. 1981) (once an order of permanent injunction is issued, the preliminary injunction merges with it and appeal may be had only from the order of permanent injunction).

Ordinarily, since the Norris-LaGuardia Act treats "temporary" and permanent injunctions identically, the issues raised in this appeal might have been thoroughly addressed in an appeal from the permanent injunction. However, the Petitioner has effectively abandoned the issues raised here by failing to appeal from the permanent injunction.

The reasoning of the court in *Certified Grocers of Illinois v. Produce Etc. Union, Local 703*, 816 F.2d 329 (7th Cir. 1987), is relevant here:

> If we were to vacate the preliminary injunction, nothing would happen; the permanent injunction would remain in force, beyond this court's power now that the time to appeal has expired. . . .
>
> The parties emphasized, in supplemental briefs filed at our request, that these

> two cases [holding that it is proper to dismiss appeals from preliminary injunctions that have merged into permanent injunctions] dealt with simultaneous appeals from preliminary and permanent injunctions, so that dismissal of the appeals from the preliminary injunctions left the court with something to review. True enough, but irrelevant. The holding of the cases is that only the permanent injunction matters, once it has been entered. The preliminary injunction no longer is the source of obligations; it cannot be reviewed, because it is gone. That is so whether or not anyone appeals from the permanent injunction. If the preliminary injunction is defunct, it is irrelevant and the appeal from it is not justiciable.

Id. at 330-31.

The possibility that "a 'merger' of the preliminary into the permanent injunction enables the court to consider the propriety of the permanent injunction without the filing of a fresh appeal," properly has been rejected on the ground that such an approach is inconsistent with "the principle that the notice of appeal must follow rather than precede the decree complained of." *Certified Grocers*, 816 F.2d at 331 (citing Fed. R. App. P. 4(a)(1) and *United States v. Hansen*, 795 F.2d 35, 37-38 (7th Cir. 1986)).

There are only limited grounds upon which a party may assert an exception to this rule. One is that an injunction bond may keep an appeal alive. *See, e.g., Stacy G. v. Pasadena Ind. Sch. Dist.*, 695 F.2d 949, 955 (5th Cir. 1983). However, there was no injunction bond in the instant case.

Petitioner has abandoned and cannot now raise the Norris-LaGuardia issue in this appeal. Even assuming that Petitioner's pending appeal in the Ninth Circuit will properly be deemed an appeal from the October 12, 1993 declaratory judgment and permanent injunction Order that followed Petitioner's September 22, 1993 Notice of Appeal, (*but see Certified Grocers, supra*), the Notice of Appeal here in no way identifies the Norris-LaGuardia issue. More significantly, Petitioner's docketing statement, executed September 29, 1993, identifies only two issues:

> 1. Whether sheriff's rule [*sic*], a basic rule of the organization, was presumptively valid, and entitled to rational basis scrutiny.
>
> 2. Whether the record shows a rational basis between [*sic*] rule and promotion of safety of persons and property.

Neither issue engages the Norris-LaGuardia Act. Finally, Petitioner's opening Brief in the merits appeal, dated February 7, 1994, also does not in any way raise the Norris-LaGuardia issue.

Under Ninth Circuit precedent, correctly interpreting Federal Rule of Appellate Procedure Rule 3(c), Respondent has now waived or abandoned the Norris-LaGuardia Act issue. *Casella v. Webb*, 883 F.2d 805, 807 n.2 (9th Cir. 1989) (issue not addressed by appeals court where not identified in or reasonably inferred from Notice of Appeal); *see C.A. May Marine Supply Company v. Brunswick Corp.*, 649 F.2d 1049, 1056 (5th Cir.), *cert. denied*, 454 U.S. 1125 (1981)); *see also Roberts v. College of the Desert*, 870 F.2d 1411, 1418-19 (9th Cir. 1988); *Denholm v. Houghton Mifflin*, 912 F.2d 357, 359 (9th Cir. 1990), *cert. denied*, ___ U.S. ___, 115 L.Ed.2d 986 (1991);

Brookens v. White, 795 F.2d 178, 180 (D.C. Cir. 1986). *Cf. Singleton v. Wulff*, 428 U.S. 106, 120 (1976).

This case does not fall within the exception to the mootness doctrine that exists where a controversy is capable of repetition but likely to evade review. That doctrine only applies where there is a "reasonable expectation that the same complaining party would be subjected to the same action again." *Weinstein v. Bradford*, 423 U.S. 147, 149 (1975). The lack of inferior court decisions on point suggests that disputes like the present one are rare. In any event, Petitioner has failed to present concrete evidence that the instant case is likely to be repeated, or otherwise to carry his obligation of demonstrating that "there exists some cognizable danger of recurrent violation, something more than the mere possibility which serves to keep the case alive." *United States v. W.T. Grant Co.*, 345 U.S. 629, 633 (1952). *See also id.* ("[T]he moving party must satisfy the Court that relief is needed.")

II.

THE COURT SHOULD DENY THE PETITION BECAUSE THERE IS NO CONFLICT AMONG THE CIRCUITS AND THE CASE RAISES NO IMPORTANT UNRESOLVED AND RECURRING QUESTIONS OF FEDERAL LAW.

There is no conflict among the circuits as to the issue raised in this case. Indeed, no other circuit court has considered this issue. The only decisions on point are district court decisions and all conclude, like the Ninth Circuit, that the Norris-LaGuardia Act is inapplicable in public employment section 1983 cases. *See Lake Michigan Coll. Fed. of Teachers v. Lake Michigan Community Coll.*,

390 F.Supp. 103, 135 (W.D. Mich. 1974) ("The court can find no evidence that Congress intended to apply the fourteenth Amendment to the states in every situation except public employment disputes in which injunctive relief is appropriate."), *rev'd on other grounds*, 518 F.2d 1091 (6th Cir. 1975); *Anderson v. Edwards*, 505 F.Supp. 1043, 1047 (S.D. Ala. 1981) ("the Norris-LaGuardia Act does not bar this court from entertaining the request which the firemen have filed to injunctive relief" regarding limitations on their right to freedom of speech); *Bowman v. Township of Pennsauken*, 709 F.Supp. 1329 (D.N.J. 1989) ("the Norris-LaGuardia Act is inapposite" because determination of federal constitutional rights not a labor dispute).

The lack of inferior court authority on this issue also demonstrates the extreme rarity of the circumstances in which it arises. It is hardly a recurring, important issue of federal law that has not been but ought to be decided by this Court. Moreover, as shown below, the Ninth Circuit's decision is consistent with this Court's decisions and will not disrupt the Norris-LaGuardia Act's anti-injunction policies or the national policy favoring arbitration. *See, e.g., Brotherhood of RT v. Howard*, 343 U.S. 768, 774 (1951); *Graham v. Brotherhood of Locomotive Firemen & Enginemen*, 338 U.S. 232, 239-40 (1949).

III.

THE COURT SHOULD DENY THE PETITION BECAUSE THE NINTH CIRCUIT DECISION BELOW DOES NOT CONFLICT WITH THE DECISIONS OF THIS COURT.

The Ninth Circuit's decision is fully consistent with this Court's previous decisions concerning 42 U.S.C.

§ 1983, its decisions concerning the Norris-LaGuardia Act, and its decisions reconciling the Norris-LaGuardia Act with other legislation.

This Court repeatedly has refused to narrow the broad scope of 42 U.S.C. § 1983. *Dennis v. Higgins*, 498 U.S. 439, 443 (1991) ("A broad construction of § 1983 is compelled by the statutory language, which speaks of deprivations of '<u>any</u> rights, privileges, or immunities secured by the Constitution and laws.'") (emphasis added by *Dennis* Court); *Golden State Transit Corp. v. Los Angeles*, 493 U.S. 103, 105 (1989) ("the coverage of [§ 1983] must be broadly construed"); *Monell v. New York City Dept. of Soc. Serv.*, 436 U.S. 658, 684 (1978) (legislative history of § 1983, a remedial statute, should be "'liberally and beneficially construed'") (quoting Rep. Shellabarger, Cong Globe, 42 Cong, 1st Sess, App. 68 (1871)).

The historical background of section 1983 was succinctly summarized by this court in *Mitchum v. Foster*, 407 U.S. 225 (1972):

> Section 1983 was originally § 1 of the Civil Rights Act of 1871. 17 Stat 13. It was "modeled" on § 2 of the Civil Rights Act of 1866, 14 stat. 27 and was enacted for the express purpose of "enforc[ing] the provisions of the Fourteenth Amendment." 17 Stat. 13. The predecessor of § 1983 was thus an important part of the basic alteration in our federal system wrought in the Reconstruction era through federal legislation and constitutional amendment. As a result of the new structure of law that emerged in the post-Civil War era -- and especially of the Fourteenth Amendment, which was its

> centerpiece, the role of the Federal Government as a guarantor of basic federal rights against state power was clearly established.

Id. at 238-39 (footnotes and citations omitted). This background underscores the importance of section 1983 as an independent source of federal remedies for constitutional violations. *See also Monroe v. Pape*, 365 U.S. 167 (1961) (reviewing legislative history of § 1983).

Mitchum is particularly apposite here, as it addressed the question of the federal court's jurisdiction in a section 1983 action to enjoin state court proceedings despite the anti-injunction statute, 28 U.S.C. § 2283, which enforced constitutional principles of state sovereignty implicated by the Eleventh Amendment. The Court held that in enacting section 1983:

> . . . Congress clearly conceived that it was altering the relationship between the States and the Nation with respect to protection of federally created rights; it was concerned that state instrumentalities could not protect those rights; it realized that state officers might, in fact, be antipathetic to the vindication of those rights; and it believed that these failings extended to the state courts.

Id. at 242.

As this Court observed in *Mitchum*, in adopting section 1983, Congress "interpose[d] the federal courts between the States and the people, as guardians of the people's federal rights . . . . In carrying out that purpose, Congress plainly authorized the federal courts to issue injunctions in § 1983 actions, by expressly authorizing a 'suit in equity' as one of the means of redress." *Id.* at 242.

As the Court more recently recognized, the section 1983 cause of action extends fully to protect the constitutional rights of public employees within the employment relationship. In *Collins v. Harker Heights, Texas*, 504 U.S. ___, 117 L.Ed.2d 261 (1992), the Court stated:

> The employment relationship [ ] is not of controlling significance. . . . [A] logical application of the [Fifth Circuit's] holding might also bar potentially meritorious claims by employees if, for example, the city had given an employee a particularly dangerous assignment in retaliation for a political speech, . . . or because of his or her gender. . . . The First Amendment, the Equal Protection and Due Process Clauses of the Fourteenth Amendment, and other provisions of the Federal Constitution afford protection to employees who serve the government as well as to those who are served by them, and § 1983 provides a cause of action for all citizens injured by an abridgement of those protections.

Id., 117 L.Ed.2d at 269-70 (citations omitted).

The Norris-LaGuardia Act was enacted in 1932, sixty-one years after the passage of the predecessor to section 1983 and during the long period when section 1983 lay dormant prior to its revival by this Court in *Monroe* in 1961. Norris-LaGuardia was passed in response to years of judicial intervention in labor disputes that was widely perceived as biased and unfair. *See* The New Federal Law of Labor Injunctions, 79 Yale L.J. 1593, 1593-94 (1970).

Section 2 of the Norris-LaGuardia Act contains a statement of official policy to be followed "in the interpretation of this Act and in determining the jurisdiction and authority of the courts of the United States." That policy is as follows:

> Whereas under prevailing economic conditions, developed with the aid of governmental authority for owners of property to organize in the corporate and other forms of ownership association, the individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment, wherefore, though he should be free to decline to associate with his fellows, it is necessary that he have full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment, and that he shall be free from interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection; therefore, the following definitions of, and limitations upon, the jurisdiction and authority of the courts of the United States are hereby enacted.

29 U.S.C. § 102. This Court has looked to this statement of policy in determining the scope and application of the act. *See, e.g., United States v. United Mine Workers*, 330 U.S. 258, (1947) (sole decision of this Court that has

directly considered the application of the Norris-LaGuardia Act to the area of public employment).

In *United Mine Workers*, the Court reasoned that the general term "person" as used in the Act could not be applied to extend the Act to a sovereign government without express words to that effect in the statute. *Id.* at 272. Although the Ninth Circuit below rejected Respondent's argument that the County, like the federal government, is not a "person" under the Norris-LaGuardia Act, 4 F.3d 716, 719-20 (9th Cir. 1993), Pet. App. at A-10 (concluding that the County is a "body politic and corporate" and therefore falls within the definition of a "person" under the Act), this issue, as well as the issue of whether or not this dispute is properly treated as a "labor dispute" within the meaning of the Norris-LaGuardia Act, might well have to be revisited if this Court granted the writ of certiorari. *See Dandridge v. Williams*, 397 U.S. 471, 475 n.6 (1976) ("The prevailing party may, of course, assert in a reviewing court any ground in support of his judgment. . . . It is likewise settled that appellee may, without taking a cross appeal, urge in support of a decree any matter, although his argument may involve an attack upon the reasoning of the lower court."); *Dayton Board of Education v. Brinkman*, 433 U.S. 406, 419 (1977).

In any event, this Court's reasoning in *United Mine Workers* remains relevant here because the Court's extensive review of the history and purpose of the Norris-LaGuardia Act in fact forces the Ninth Circuit panel's ultimate holding that Respondent's section 1983 action is excepted from the Act.

In *United Mine Workers* the Court reasoned that the purposes section of the Act:

> . . . predicates the purpose of the Act on the contrast between the position of the "individual unorganized worker" and that of the "owners of property" who have been permitted to "organize in the corporate and other forms of ownership association," and on the consequent helplessness of the worker. . . . These considerations, on their face, obviously do not apply to the Government as an employer and to the relationship between the Government and its employees.

United Mine Workers, 330 U.S. at 274. Such considerations also do not apply in the context of County government employment.

At the time the Norris-LaGuardia Act was passed in 1932, Congress was concerned about the judicial use of injunctions to defeat strikes. At the time Congress' concern was with strikes only in the private sector, as public employees were generally barred from striking and were the subject of state regulation. Almost certainly, therefore, Congress did not envision the application of the Act in the public employment area.

In *Director, Division of Employment Relations v. Labor Relations Commission*, 346 N.E.2d 852 (Mass. 1976), a state "Little Norris-LaGuardia Act" case, the Supreme Judicial Court of Massachusetts correctly explained:

> basic differences between labor relations in the private and public sectors. Whereas the strike has been a protected weapon of private-sector employees since the 1930's, public employees have not had similar artillery . . . a distinction rationalized and

> justified on many grounds. . . . Thus, although in the private sector a union's contractual waiver of its statutory right to strike may be presumptively tied to the employer's acceptance of binding arbitration for resolution of contractual disputes . . . , no similar linkage exists in public sector cases.

Id. at 859 (citations and footnotes omitted); *see also*, Anderson, "Strikes and Impasse Resolution in Public Employment," 67 Mich. L.R. 943, 951 (1961) ("[F]ederal law protects the right to strike in private employment, while public employment disputes are a matter for state regulation.").

The procedural requirements of the Norris-LaGuardia Act underscore this lack of Congressional intent to apply the Act to the public sector employment. For example, section 7 sets forth strict procedural rules for issuing injunctions in those situations where the Act does not bar them altogether. That section requires that before issuing an injunction, a court give notice to "the chief of those public officials of the county and city within which the unlawful acts have been threatened or committed charged with the duty to protect complainant's property." 29 U.S.C. § 107. The same section requires a finding that "the public officers charged with the duty to protect complainants' property are unable or unwilling to furnish adequate protection." *Id.* Such provisions contemplate a situation such as a strike or other labor action where violence is threatened, and do not encompass a situation where the public officer charged with duty to protect complainant's property is also the defendant in the suit. *See United Mine Workers*, 330 U.S. at 276 (If the coercive power of the federal government were ineffective to protect the property of the government, then an injunction would

be "meaningless form" since it would have to be enforced by the same coercive power).

The Court in *United Mine Workers*, 330 U.S. at 275-276, also looked at the language of §13 (a) and (b) of the Act, and concluded:

> Every one of these qualifications in § 13(a) and (b) we think relates to an economic role ordinarily filled by a private individual or corporation, and not by a sovereign government. None of them is at all suggestive of any part played by the United States in its relations with its own employees.

Id. at 275-76. After further review of the legislative history, the Court ultimately decided that "the Norris-LaGuardia Act did not affect the jurisdiction of the Courts to issue injunctions when sought by the United States in a labor dispute with its own employees." *Id.* at 282.

The Court's rationales apply equally well in the local government context. *See Lake Michigan College Federation of Teachers v. Lake Michigan Community College*, 390 F.Supp. 103, 135 (W.D. Mich. 1974) ("Although United Mine Workers applied specifically to the federal government, many of the same elements of statutory language and legislative history indicate just as clearly that the Act was also not intended to extend to public employment situations on the state and local level.")

Although no other Supreme Court case has addressed the application of the Norris-LaGuardia Act to the public employment sector, there are a number of occasions when the Court has been required to accommodate Norris-LaGuardia to other statutes.

Of these, *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448 (1957), is particularly instructive because it required this Court to accommodate the Norris-LaGuardia Act with another broad remedial act, the Labor Management Relations Act of 1947. Section 301 of the Labor Management Relations Act of 1947, 29 U.S.C. 185, amending the National Labor Relations Act, is similar to 42 U.S.C. § 1983 in that both are broad remedial statutes that allow for both monetary and injunctive relief.

In *Lincoln Mills*, a union had moved for an injunction to compel an employer to arbitrate, and the employer invoked the Norris-LaGuardia Act to block the injunction. The Court rejected the employer's interpretation of the scope of the Norris-LaGuardia Act, reasoning that:

> The question remains whether jurisdiction to compel arbitration of grievance disputes is withdrawn by the Norris-LaGuardia Act, 47 Stat 70, 29 U.S.C. § 101. Section 7 of that Act prescribes stiff procedural requirements for issuing an injunction in a labor dispute. The kinds of acts which had given rise to abuse of power to enjoin are listed in § 4. The failure to arbitrate was not part and parcel of the abuses against which the Act was aimed. . . . Though a literal reading might bring the dispute within the terms of the Act, . . . we see no justification in policy for restricting § 301(a) to damage suits, leaving specific performance of a contract to arbitrate grievance to the inapposite procedural requirements of that Act. Moreover, we held in Virginia Railway Co. v. System Federation, R.E.D. 300 U.S. 515, 81 L ed 789, 57 S Ct 592, and in Graham v. Brotherhood of

> Locomotive Firemen & E. 338 US 232, 237, 94 L ed 22, 28, 70 S Ct 14, that the Norris-LaGuardia Act does not deprive federal courts of jurisdiction to compel compliance with the mandates of the Railway Labor Act. The mandates there involved concerned racial discrimination. Yet those decisions were not based on any peculiarities of the Railway Labor Act. We followed the same course in Syres v. Oil Workers International Union, 350 U.S. 892, 100 L ed 785, 76 S ct 152, which was governed by the National Labor Relations Act. There an injunction was sought against racial discrimination in application of a collective bargaining agreement; and we allowed the injunction to issue.

Id. at 457-458.

These cases suggest that the Ninth Circuit was entirely correct here in identifying section 1983 actions as one of "narrow band of labor disputes in which it is appropriate for a federal court to issue a labor injunction." Pet. App. at A-10, 4 F.3d at 719. Contrary to Petitioner's assertions, this narrow band is not limited to instances where the Court was encouraging arbitration. Pet. App. at 7-8. This Court has also recognized exceptions in cases involving racial discrimination. *See Brotherhood of R.T. v. Howard*, 343 U.S. 768, 774 (1951) ("the District Court has jurisdiction and power to issue necessary injunctive orders notwithstanding the provisions of the Norris-La-Guardia Act"); *Graham v. Brotherhood of Locomotive Firemen & Enginemen*, 338 U.S. 232, 239-40 (1949) ("Nor does the Norris-LaGuardia Act contain anything to suggest that it would deprive these Negro firemen of recourse to equitable relief from illegal discriminatory representation

by which there would be taken from them their seniority and ultimately their jobs. . . . If, in spite of the *Virginian, Steele and Tunstall* Cases (US) all *supra*, there remains any illusion that under the Norris-LaGuardia Act the federal courts are powerless to enforce these rights, we dispel it now.")

The exception sketched in these cases is also partly driven by an understanding that application of the Norris-LaGuardia Act would strip certain remedies from an otherwise broad remedial scheme without any logical purpose. The issues at stake on the merits of a section 1983 case are entirely congruent with those at stake in the race discrimination in employment cases which this Court repeatedly has acknowledged are excepted from the Norris-LaGuardia Act. Hence, as the Ninth Circuit correctly reasoned here, "it would be incongruous to read Norris-LaGuardia to preclude equitable relief as a remedy available to the injured party under section 1983 just because the parties are involved in a labor dispute." Pet. App. at A-11, 4 F.3d at 720.

IV.

THE COURT SHOULD DENY THE PETITION BECAUSE THE DECISION BELOW DOES NOT IMPLICATE THE POLICY FAVORING ARBITRATION, RESPECTS THE PRINCIPLE THAT SECTION 1983 PLAINTIFFS NEED NOT EXHAUST OTHER REMEDIES PRIOR TO SUIT, AND WILL NOT ENCOURAGE OR INCREASE LITIGATION IN FEDERAL COURTS.

Petitioner argues that, as a result of the Ninth Circuit's decision, "labor disputes, including discharges and discipline, that were formerly handled by grievance procedures and binding arbitration under labor agreements will now be decided in federal Courts." Pet. App. at 5. This is nonsense. This case involves a rarified constitutional dispute that happens to implicate a public employment relationship, not private-sector labor disputes that are the subject of national labor policy under statutes like the National Labor Relations Act and the Railway Labor Act that favor arbitration. As this Court recently reaffirmed in *Collins v. City of Harker Heights, Texas*, 504 U.S. ___, 117 L.Ed.2d 261 (1992), the public employment relationship engages constitutionally protected interests that are not implicated in the private employment relationship. Contrary to Petitioner's assertion, therefore, *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448 (1957), is inapposite.

Moreover, arbitration cannot be a final process and remedy in cases like the instant one involving constitutional rights. *See Alexander v. Gardner-Denver*, 415 U.S. 36, 59-60 (1974) (holding "that the federal policy favoring arbitration of labor disputes and the federal policy against discriminatory employment practices can best be accommo-

dated by permitting an employee to pursue fully both fully both his remedy under the grievance arbitration clause of a collective bargaining agreement and his cause of action under Title VII.") *See also Gilmer v. Interstate/Jahnson Lane*, 500 U.S. 20 (1991) (holding that rationale of *Gardner-Denver* line of cases is confined to collective bargaining area because in those cases "an important concern was the tension between collective bargaining representation and individual statutory rights")

Significantly, as well, the collective bargaining agreement between the County of Multnomah, Oregon and the Multnomah County Corrections Officers Association does not purport to waive, or commit to the grievance and arbitration process, the constitutional rights of Multnomah County Corrections Officers such as Reuter. In fact, the agreement explicitly states that employees "shall not waive or be deprived of any constitutional or civil rights guaranteed by the Federal and state Constitutions and Laws afforded any citizen of the United States." (ER 50).

Even if the collective bargaining agreement between the County and the Officers Association contained an express provision ratifying the policy banning intimate relationships with ex-inmates, union acquiescence to such a provision would not in any way insulate the County policy at issue here from judicial scrutiny. Nor would it be deemed a waiver of an individual employee's section 1983 rights. *See Alexander v. Gardner-Denver Company*, 415 U.S. 36, 51 (1974) ("a union may waive certain statutory rights related to collective activity, such as the right to strike. . . . Title VII, on the other hand, stands on plainly different ground; it concerns not majoritarian processes, but an individual's right to equal employment opportunities.")

The irrelevance of the national labor policy favoring arbitration is made all the more clear by the fact that the issues Petitioner raises here concern only remedies, not the right to bring suit under section 1983. A ruling that the Norris-LaGuardia Act bars federal courts from issuing "temporary" injunctions in section 1983 cases would not discourage litigation of damage claims arising in these cases. Indeed, Petitioner admits that when labor disputes implicate constitutional rights, public sector employees can always "obtain equitable relief in the form of reinstatement and backpay, and damages and attorney fees in actions under 42 U.S.C. § 1983." *See* Pet. App. at 6. Hence application of the Norris-LaGuardia Act here would deny plaintiffs litigating these cases only a provisional remedy that preserves the *status quo ante* during litigation. No significant reduction in litigation would follow.

Finally, exhaustion of other remedies is not a precursor to section 1983 actions, rendering the national policy favoring arbitration all the more irrelevant. *Felder v. Casey*, 487 U.S. 131 (1988) (§ 1983 claims for relief "'exist independent of any other legal or administrative relief that may be available as a matter of federal or state law. They are judicially enforceable in the first instance.'") (quoting *Burnett v. Grattan*, 468 U.S. 42, 50 (1984)) (emphasis added by *Felder* Court); *See also Patsy v. Board of Regents*, 457 U.S. 496, 500 (1982); *Monroe v. Pape*, 365 U.S. 167, 183 (1961).

CONCLUSION

For the foregoing reasons, the Court should deny the Petition for Writ of Certiorari.

Dated: March 14, 1994

Respectfully submitted

* SANFORD JAY ROSEN
THOMAS NOLAN
ROSEN, BIEN & ASARO
155 Montgomery Street, 8th Floor
San Francisco, California 94104
Telephone: (415) 433-6830

SPENCER M. NEAL
GINSBURG & NEAL
500 Yamhill Plaza Building
815 S.W. Second Avenue
Portland, Oregon 97204
Telephone: (501) 221-1792

* *Counsel of Record*

[filed August 24, 1993]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

KIM REUTER,	)	
Plaintiff	)	Civil No. 92-1622-RE
vs.	)	
BOB SKIPPER,	)	O R D E R
Defendant.	)	
	)	

REDDEN, Judge:

Plaintiff's Motion for Partial Summary Judgment (doc. #32) is granted. Defendant's Response to Motion for Preliminary Injunction (doc. #11), which the court agreed to treat as a Motion for Summary Judgment, is denied.

A telephone status conference is set on August 30, 1993 at 1:15 p.m. The court will initiate the call. Please notify Ingrid Campbell at 326-6389 immediately if anyone other than Spencer Neal and Steven Nemirow will participate in the telephone conference.

IT IS SO ORDERED.

Dated this 23 day of August, 1993.

/ James A. Redden
United States District Judge

[filed August 24, 1993]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

KIM REUTER, Plaintiff	)	Civil No. 92-1622-RE
vs.	)	
BOB SKIPPER, Defendant.	)	OPINION

Spencer M. Neal
Ginsburg & Neal
500 Yamhill Plaza Building
815 S.W. Second Avenue
Portland, Oregon 97204

Lisa M. LeSage
Ginsburg & Neal
A-150 Colonial Plaza Building
1049 S.W. Baseline
Hillsboro, Oregon 97123
Attorneys for plaintiff

Laurence Kressel
County Counsel for Multnomah County
Seven J. Nemirow
Assistant County Counsel
P.O. Box 849
Portland, Oregon 97207-0849
Attorneys for defendant

REDDEN, Judge:

PROCEDURAL BACKGROUND

Plaintiff, Kim Reuter, is a female corrections officer employed by Multnomah County. She was placed on paid administrative leave in October 1992 due to her personal association with a man who once had been confined in a correctional facility (an "ex-felon"). On December 17, 1992, she was informed by Major Slyter of the Multnomah County Sheriff's Office, that he would recommend her termination from County employment because of her association with the ex-felon. Plaintiff filed this lawsuit seeking a preliminary injunction to prohibit the county from firing her. She also sought a temporary restraining order (TRO) to prevent her firing at Christmas.

On November 24, 1992, this court granted plaintiff's motion for a TRO, restraining defendant, the Multnomah County Sheriff, from discharging plaintiff. Defendant stipulated to expansion of the TRO beyond ten days until the preliminary injunction hearing. Defendant then filed a Motion to Dissolve the TRO on January 11, 1993. This motion was subsumed in the motion for preliminary injunction.

FACTUAL BACKGROUND

Plaintiff brings this action pursuant to 42 U.S.C. § 1983 seeking declarations that (1) her association with the ex-felon is protected by the first amendment of the United States Constitution; and (2) that defendant's work rules are constitutionally overbroad. Plaintiff also seeks compensatory damages pursuant to 42 U.S.C. § 1983.

The Sheriff's Office has work rules covering its employees. Those rules were recently amended on November 20, 1992. The amended work rules provide, in part:

> Determining Prohibited Activities:
>
> (2) Presumptive Conflicts of Interest. A prohibited conflict of interest is presumed to exist where a member engages in an ongoing and continuous business, social or non-marital sexual relationship with another person when:
>
> . . .
>
> (b) the other person has been imprisoned for or convicted of a felony within the past ten years....
>
> (3) If a presumptive conflict of interest is shown to exist, the burden shall be upon the member to show their activity or relationship with the other person is unavoidable and would not endanger safety and security of Sheriff's Office operations or facilities, negatively impact the member's job performance, or create an unfavorable public perception of the Sheriff's Office.

Sheriff's Work Rules, W.100.110.07, as amended.

In the fall of 1991, plaintiff became involved with an ex-inmate who was convicted of a felony within the last ten years. Plaintiff alleges that when she learned of this person's status as an "ex-inmate," she orally reported this relationship to the Sheriff's Office and then filed a written report dated October 18, 1991. At the time that plaintiff began her relationship with the ex-felon, the sheriff's rules did not make her association with a person who was convicted of a felony within the past ten years a "presumptive conflict of interest."

In October 1992, plaintiff's relationship with the ex-inmate again became the subject of the Sheriff's Office

scrutiny and another investigation was undertaken. On October 20, 1992, plaintiff was suspended from her employment from the Sheriff's Office with pay. On December 17, 1992, plaintiff appeared before Major Slyter, Facilities Division Commander, who advised her that, in light of her expressed intention to continue her intimate association with an ex-felon, he would recommend that she be terminated from the Sheriff's Office. Slyter claimed that plaintiff's association with an ex-felon would create a potential compromise of the Sheriff's Office because of plaintiff's access to confidential records. In a letter dated Jan. 5, 1993, plaintiff was informed by John Schweitzer, Deputy Chief, Corrections Branch, that the allegations that she had violated the work rules were sustained and that her employment may be terminated.

Plaintiff alleges that defendant's conduct violates her right to associate in an intimate relationship in violation of the first amendment. Plaintiff also argues that defendant's conduct violates her right to privacy under the fourteenth amendment. Plaintiffs seeks redress for both of these alleged violations pursuant to 42 U.S.C. § 1983.

Plaintiff files a motion for partial summary judgment on the issue of liability. Defendant files a cross motion for summary judgment. Plaintiff's motion is granted.

STANDARDS

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The materiality of a fact is determined by the substantive law on the issue. T.W. Electrical

Service, Inc., v. Pacific Electrical Contractors Assoc., 809 F.2d 626, 630 (9th Cir. 1987). The authenticity of a dispute is determined by whether the evidence is such that a reasonable jury could return a verdict for the nonmoving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986).

The moving party has the burden of establishing the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). If the moving party shows the absence of a genuine issue of material fact, the nonmoving party must go beyond the pleadings and identify facts which show a genuine issue for trial. Id. at 324.

Special rules of construction apply to evaluating summary judgment motions: (1) all reasonable doubts as to the existence of genuine issues of material fact should be resolved against the moving party; and (2) all inferences to be drawn from the underlying facts must be viewed in the light most favorable to the nonmoving party. T.W. Electrical, 809 F.2d at 630.

DISCUSSION

1. Standard of Review

The first issue argued by the parties is the appropriate standard of review to be used by the court for evaluating defendant's rule. Defendant argues that it should be one of "rational basis." In that case defendant must show that the work rule has at least a "rational connection" to the promotion of safety of persons and property. See Kelley v. Johnson, 425 U.S. 238, 247 (1976).

Plaintiff contends that the standard is one of intermediate scrutiny. Intermediate scrutiny requires that governmental rules that restrict constitutional behavior

"need only be tailored in a reasonable manner to serve a substantial state interest . . . ." Edenfield v. Fane, ___ U.S. ___, 113 S. Ct. at 1798 (1993).

I agree with plaintiff that the standard of review in this case should be one of intermediate scrutiny. I find that a couple living together as husband and wife constitute a "family" in today's society and is therefore entitled to protection from the state's intrusions, judged at a higher level of standard of review. When the state intrudes into the family unit, its rules must be tailored in a reasonable manner to serve a substantial state interest. I find that the state's professed interest in maintaining the "security" of the Sheriff's Office is not tailored in a reasonable manner to serve that state interest.

2. Rational Relation

Moreover, even assuming that a couple living together as husband and wife do not qualify as a "family" and therefore are not entitled to the intermediate level of review, I find that defendant's evidence of the rule being rationally related to issues of public and officer safety and security is minimal. Defendant has failed to offer sufficient evidence to support his contention that the work rule of which plaintiff complains is rationally connected to defendant's duty of security and safety in its jails.

As noted above, defendant's first work rule prohibited various relationships outside of the professional context if they "would jeopardize any investigation, prosecution or would reflect unfavorably upon the integrity of the member, the Sheriff's Office, or Sheriff." Under this rule, there must be some showing of harm to defendant, either by compromising an investigation or prosecution, or by besmirching the reputation of the member or employee.

Defendant's current work rule, promulgated November 20, 1992, after plaintiff was disciplined for her off-the-job association with her domestic partner, has the same restrictions as the earlier rule quoted above. New guidelines, however, are added for determining whether a relationship is prohibited, as is a set of presumptive conflicts of interest. The current rule also provides:

> W1.100.110.09 Effect of Marriage of Involved Person The Sheriff recognizes a member's fundamental right to marriage and procreation. However, if a member knows or has a reasonable basis to know their prospective spouse is an involved person prior to marriage, the member's subsequent marriage to the involved person shall not, in and of itself, justify a relationship which otherwise would constitute a conflict of interest; nor shall the member's marriage to the involved person constitute a defense to a complaint against the member brought under this rule.

In Thorne v. City of El Segundo, 726 F.2d 459 (9th Cir. 1983), the court held that

> the City must show that its inquiry into appellant's sex life was justified by the legitimate interests of the police department, that the inquiry was narrowly tailored to meet those legitimate interests, and that the department's use of the information is obtained about appellant's sexual history was proper in light of the state's interests.

Id. at 469.

The court then held that the City failed to meet its burden:

> In the absence of any showing that private, off-duty, personal activities of the type protected by the constitutional guarantees of privacy and free association have an impact upon an appellant's on-the-job performance, and of specific policies with narrow implementing regulations, we hold that reliance on these private non-job-related considerations by the state in rejecting an applicant for employment violates the applicant's protected constitutional interests and cannot be upheld under any level of scrutiny.

Id. at 471. I find this standard appropriate here.

In Fugate v. Phoenix Civil Service Board, 791 F.2d 736 (9th Cir. 1986), the court reiterated the holding in Thorne, stating that because Thorne's "private, off-duty sexual activities were protected, and because the city could demonstrate no impact upon an applicant's on-the-job performance and failed to show specific policies with narrow implementing regulations, the City's rejection of Thorne for employment was impermissible." Id. at 740. The court then distinguished Thorne because the officers in Fugate engaged in sexual relations while on the job and the City of Phoenix demonstrated that the officers' "job performance was threatened by obvious conflicts of interest as well as by the possibility of blackmail." Id. at 741. Because of these distinctions, the court found that the protection of the right of privacy found in Thorne did not apply and the city only had to satisfy the rational basis test of Kelly v. Johnson, 425 U.S. 238 (1976).

Similarly, in Fleisher v. City of Signal Hill, 829 F.2d 1491 (9th Cir. 1987), a probationary police officer engaged in sexual conduct with a 15-year-old girl while both of them were Explorer Scouts with the police department. Id. at 1492. The police officer sued for damages

pursuant to 42 U.S.C. § 1983 alleging violation of his right of privacy. Id. The court held that the department did not violate Fleisher's right of privacy by terminating him. The court stated that this conduct was "illegal, [and] inappropriate in an individual who aspired to become an officer on the Department's police force, and detrimental to the Department as a whole. The illegality of Fleisher's behavior creates a substantial barrier to successfully asserting a privacy claim . . . ." Id. at 1498.

I find that plaintiff's situation is factually closer to Thorne rather than either Fugate or Fleisher. Plaintiff's intimate association with her domestic partner was only conducted off-duty and in private. Second, her private, off-duty sexual activities came to light only because she had to report them under the challenged work rule. Third, the Sheriff has made no showing that plaintiff's relationship with her domestic partner has had any impact on plaintiff's on-the-job performance, a showing that is required by Thorne, Fugate and Fleisher. Plaintiff alleges that the Sheriff has only raised speculative fears that the plaintiff is now untrustworthy because of her association with an ex-convict. Defendant's speculation is insufficient to meet the burden of proof that the Ninth Circuit has established. I further note an additional distinguished feature between plaintiff's case and the facts in Fugate and Fleisher; her intimate relationship with an ex-convict, even if her is presently married to another person, is not in any way prohibited by the laws of the State of Oregon, as were the relationships in Fleisher and Fugate.

Plaintiff also cites as evidence the statements of two correctional professionals, Allen Breed and James Harrigan. Breed states in his affidavit that he is unaware of any jurisdiction having a rule as broad as the one at issue here. It is his opinion that such a rule goes far beyond any

reasonable penological purpose and does not relate to the legitimate demands of the sheriff's office.

Harrigan is the legal counsel for the Sheriff of San Francisco. Its rules prohibit personal relationships between inmates and department employees. The rules do not, however, prohibit its employees from associating with persons away from the jail simply because those persons may have once been convicted of committing a crime. He is also unaware of any other sheriff's department that has a rule similar to the one at issue here.

Both experts stated that the rule was unworkable and not reasonably related to the needs of the Sheriff's Office.

The plaintiff next argues that defendant's rule also violates the state constitution which states, "Laws for the punishment of crime shall be founded on the principles of reformation, and not of vindictive justice." Art. I, Sec. 15. I agree that terminating plaintiff's employment with the county simply because she is living with an ex-convict would continue to punish her domestic partner for a crime for which he has already paid his debt to society by penalizing his association with another.

The case relied on by defendant, Kukla v. Village of Antioch, 647 F. Supp. 799 (N.D. Ill. 1986), is distinguishable. There, a small village police department fired a sergeant and a dispatcher for living together as husband and wife without actually being married. The rule at issue there prohibited any socialization between employees of different ranks. The court found the small town size and small police force significant. There were only 16 employees on the entire force. The court held:

> If an Antioch sergeant developed a relationship with an Antioch patrolman or dispatcher, certain reactions are predictable, among them that other Antioch patrolmen or dispatchers would tiptoe lightly around certain subjects for fear of offending that sergeant. After all, in Antioch, offending one sergeant meant offending half of all the sergeants on the force. Given human nature, a belief that an intra-departmental relationship would negatively affect the department is more reasonable on a small force than a large one.

Id. at 810. The court noted that the Chicago police department would have a much more difficult task in justifying a discharge of a sergeant and a dispatcher for their off-duty living arrangements. Id. at 811. The court also relied upon the previous experience in the police department which "supported a belief in the likelihood of negative affects from such a relationship." Id. at 810. The court required that there be a factual predicate for the city's reasonable belief that the relationship would cause harm.

Kukla can be distinguished as follows: first, in Kukla, the police force was very small; therefore any intimate relationships between a sergeant and other officers would be obvious. In plaintiff's case, her relationship only came to light because she was required to report it. Second, in Kukla, the police department had problems in the past with supervisors dating subordinate officers because of the unwillingness of other officers to report mistakes for fear of alienating the sergeants. Here, defendant has no history of problems caused by a corrections officer living with an ex-convict. Defendant has produced no evidence that the mere association of an officer with someone who had once been convicted of a felony in another state has caused any problems in the

department. The court in Kukla required a reasonable basis for the city's rule. Here, the sheriff's rule lacks a reasonable basis.

I also find merit in plaintiff's argument regarding inconsistency with the rules that allow an employee with a family member in jail to visit and correspond with that family member "so long as the [employee] complies with the policies and procedures of the facility or program governing such conduct." W1.100.110.10.

Defendant's fear that plaintiff's relationship will cause her to compromise the safety and security of the jail is promised on the assumption that her relationship somehow creates a conflict of interest between her domestic partner and her official duties. Plaintiff points out that her domestic partner is not incarcerated so there is no occasion for a conflict of interest to arise.

Plaintiff relies on the deposition testimony of Sergeant Miller, an investigator with the Internal Affairs unit of the Multnomah County Sheriff's Office, and Chief Deputy Schweitzer, who is in charge of the corrections branch of the sheriff's office. Plaintiff argues that based on the testimony of these two officers that defendant's real reason for firing plaintiff was to achieve some consistency in the sheriff's discipline of correction officers. Sgt. Miller testified that there have been three female corrections officers who were suspended for being in relationships with ex-inmates. Chief Schweitzer testified that he had no evidence that the plaintiff's relationship with her domestic partner had caused any harm to the safety and security of any county jail facility, or that the relationship had caused any harm to her performance as a corrections officer, or that it has caused any harm to the public's perception of the Sheriff's Office.

Chief Schweitzer was questioned about his knowledge of the arrest and conviction of a corrections officer named Sgt. Asboe for "fraudulently obtaining drugs or narcotics." The officer was demoted (not fired) because "the determination was made that reduction in rank would suffice as a form of discipline in that case." Schweitzer admitted that there was a "possibility" that Asboe's conviction made him susceptible to blackmail or pressure by the inmates.

Defendant focuses on the fact that Troutdale Police officers saw plaintiff in her uniform, "kissing and hugging a known felon in front of a bar just four blocks from the Troutdale police station." Defendant's Opposition, p.2 Plaintiff responds that it has not been established that the public in general knew of the criminal record of plaintiff's domestic partner. Defendant submits only the affidavit of Troutdale Police Chief Collier, who claims that plaintiff's domestic partner is a known felon. Collier fails to state who knows this fact except his officers, and it is not even clear from the affidavit that his officers know this fact. Further, I note that plaintiff is not being disciplined for public displays of affection.

Defendant next claims that one of his lieutenants, Lt. Goss, informally interviewed plaintiff and warned her that this association could jeopardize her career. Plaintiff responds that the record is undisputed that after the 1991 investigation of her relationship, she was never ordered by anyone to terminate it. Plaintiff asserts that what defendant is now claiming to be a breach of security and professional ethics was insufficient to prompt any formal action from the Sheriff's Office when investigated in 1991.

CONCLUSION

Plaintiff's motion for partial summary judgment on the issue of liability is granted. I find that plaintiff's relationship with her domestic partner qualifies as a family and therefore is entitled to an intermediate standard of review. Intermediate scrutiny requires that governmental rules that restrict constitutional behavior be tailored in an reasonable manner to serve a substantial state interest. Defendant's work rule fails to be reasonably tailored to serve the state's interest of security and protection of the jail facility. Moreover, even if defendant's work rule is examined under the rational relation standard of review, I find no rational connection between the rule and the promotion of safety of persons and property. Defendant's motion for summary judgment is denied.

Dated this 23 day of August, 1993.

/ James A. Redden
United States District Judge

[filed October 12, 1993]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

KIM REUTER,	)	
Plaintiff	)	Civil No. 92-1622 RE
vs.	)	
BOB SKIPPER,	)	PERMANENT INJUNCTION
	)	AND DECLARATORY
Defendant.	)	JUDGMENT
	)	

Plaintiff in the above-entitled action commenced an action against defendant, the Sheriff of Multnomah County, and sought monetary and equitable relief against defendant including a declaration that her constitutional rights have been violated and a permanent injunction barring the termination of her employment as a correctional officer based upon the enforcement of W1.100.110, either in its original form or as amended on or about November 20, 1992.

After hearing on the parties' cross-motions for summary judgment on the issue of liability and after considering the affidavits submitted with those motions and the testimony offered by the parties in open court, it appears to the court that defendant is committing acts, and is about commit acts as set forth in plaintiff's complaint, and will continue to do so unless restrained by order of this court, and that immediate and irreparable injury will result to plaintiff as a result of the enforcement of defendant's work rule against her.

IT IS ORDERED, ADJUDGED, AND DECREED that defendant Bob Skipper, Sheriff of Multnomah County, his successors in office, agents, representatives, employees,

attorneys, and all other persons in active concert and participation with them, be and hereby are permanently enjoined and restrained from in any manner enforcing against plaintiff W1.100.110 based upon her association with her domestic partner.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that W1.100.110, either in its original form or as amended on or about November 20, 1992, is declared to be violative of the First and Fourteenth Amendments to the Constitution of the United States and is void to the extent that said work rule interferes with family relationships of correctional officers.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that plaintiff shall be returned immediately to active duty in her position as a correctional officer without any loss of seniority, benefits or pay as a result of the enforcement of W1.100.110 against her.

Plaintiff is entitled to her costs and reasonable attorney fees incurred in this matter.

The court shall maintain jurisdiction of this case in order to enforce the injunction issued herein.

DATED this 8 day of October, 1993.

/ James A. Redden
United States District Judge

Presented by:

/ Spencer M. Neal
Of Attorneys for Plaintiff

Supreme Court, U.S.
FILED
MAR 24 1994

No. 93-1070

In The

Supreme Court of the United States

October Term, 1993

BOB SKIPPER, SHERIFF OF MULTNOMAH COUNTY,

Petitioner,

v.

KIM REUTER,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITIONER'S REPLY BRIEF

STEVEN J. NEMIROW*
Assistant County Counsel
LAURENCE KRESSEL
Multnomah County Counsel
P.O. Box 849
Portland, Oregon 97207
(503) 248-3138

Attorneys for Petitioner

*Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

Page

Introduction 1

The issues raised by the preliminary injunction do not merge into those raised by the permanent injunction 1

Petitioner never abandoned this appeal 4

This case is not moot 5

TABLE OF AUTHORITIES

Boys Markets, Inc. v. Retail Clerks Union, 398 U.S. 235 (1970) 2

Certified Grocers of Ill. v. Produce Etc. Un., Local 703, 816 F.2d 329 (7th Cir. 1987) 1, 7

County of L.A. v. Davis, 440 U.S. 625 (1979) 1

Inter. U., United Auto., Etc. v. LaSalle Mach. Tool, 696 F.2d 452 (6th Cir. 1982) 2, 3, 7

Lever Bros. Co. v. Intern. Chemical Workers Union, Etc., 554 F.2d 115 (6th Cir. 1976) 3

Nebraska Press Association v. Stuart, 427 U.S. 539 (1976) 6

Reuter v. Skipper, 4 F.3d 716 (9th Cir. 1993) 4

United States v. United Mine Workers, 330 U.S. 258 (1947) 3

Weinstein v. Bradford, 423 U.S. 147 (1975) 5

Respondent fails to meet its heavy burden to demonstrate that this case has become moot, *County of L.A. v. Davis*, 440 U.S. 625 (1979), or to show that the issues presented by the preliminary injunction in this case merged into the issues presented by the permanent injunction.[1] Moreover, Respondent fails to address the issue of damages stemming from the wrongfully issued preliminary injunction. Plainly, the issues presented by this appeal are alive, and not moot.

INTRODUCTION

1. The issues raised by the preliminary injunction do not merge into those raised by the permanent injunction.

The district court decided that the Norris-LaGuardia Act (the "Act") did not apply to the present case, and in so doing failed to follow the Act's strict requirements for issuance of an injunction. 29 U.S.C. § 107 requires posting of adequate security before issuing a preliminary injunction. It also requires that the bond cover all reasonable costs, including reasonable attorney fees and the expense of defense caused by the improvident or erroneous issuance of such an order. These costs and damages are separate from those incurred in defending Respondent's § 1983 action.

---

[1] Respondent string-cites a series of inapposite cases to establish an irrelevant point, i.e., that in a non-labor context, a preliminary injunction often merges into a permanent injunction (Resp. Brief in Opp. p. 7-8). Only one case Respondent cites involves the Act: *Certified Grocers of Ill. v. Produce Etc. Un., Loc. 703*, 816 F.2d 329 (7th Cir. 1987), discussed *infra*.

If an injunction is improperly granted and the party against whom it was granted is entitled to recover damages resulting from the wrongful issuance, the expiration of the preliminary injunction does not render the litigation moot. *Inter. U., United Auto., Etc. v. LaSalle Mach. Tool*, 696 F.2d 452 (6th Cir. 1982).

In *Inter. U., United Auto., Etc. v. LaSalle Mach. Tool*, the employer intended to sell its machinery, subcontract its work and terminate employees in violation of an agreement not to subcontract. The district court issued a *Boys Market* injunction[2] pending arbitration, and ordered the union to post a bond. The employer appealed, but the arbitrator issued his award before the Sixth Circuit decided the appeal. The union argued that the appeal of the preliminary injunction was moot. The Sixth Circuit found to the contrary, despite the fact that the union had never actually posted the required bond:

> The issuance of an injunction in a case involving or growing out of a labor dispute must be conditioned on an undertaking by the person seeking the injunction to make the person enjoined whole for any loss, expense or damage caused by the improvident or erroneous issuance of the injunction. This requirement is made jurisdictional by § 1 of the Norris-LaGuardia Act, 29

---

[2] A so-called *Boys Market* injunction is a recognized exception to the Act's prohibition against injunctions. In *Boys Markets, Inc. v. Retail Clerks Union*, 398 U.S. 235 (1970), the Court authorized an injunction against a strike where an employer had agreed to final and binding arbitration as the quid pro quo for an agreement not to strike. It found that, in the absence of the availability of injunctive relief in such situations, the important federal policy favoring arbitration would be undermined.

> U.S.C. § 101, supra. Having sought and obtained a preliminary injunction the union is obligated to pay the costs and damages incurred or suffered by the party found to have been wrongfully enjoined. 696 F.2d 452, 459.

The Sixth Circuit relied on a factually similar case, *Lever Bros. Co. v. Intern. Chemical Workers Union, Etc.*, 554 F.2d 115 (6th Cir. 1976):

> Rule 65(c) of the Federal Rules of Civil Procedure does not stand as authority that injunction bonds in labor cases are to be conditioned on the outcome of the merits of arbitration. Rather, it is settled that the recoverable damages under such a bond are those that arise from the operation of the injunction itself and not from damages occasioned by the suit independently of the injunction. 554 F.2d 115 at 120.

In the present case, the district court premised its injunction on its conclusion that the Act did not apply to municipal employers, and that plaintiff's impending termination was not a labor dispute. The Ninth Circuit disagreed, expressly holding that *United States v. United Mine Workers*, 330 U.S. 258 (1947), does not exclude municipal employers from the Act's coverage ("*Mine Workers* is inapposite." App. Pet. A-8), and that plaintiff's impending termination was indeed a labor dispute ("Under Norris-LaGuardia's "broad" definition, this is a labor dispute." App. Pet. A-7). Because the Ninth Circuit decided that this labor dispute fell within the exception to the Act, it in effect found that Respondent should have been required to post a bond. However, just as in *Inter. U., United Auto., Etc. v. LaSalle Mach. Tool, supra*, such a

failure does not make the wrongful issuance of the injunction moot.

2. Petitioner never abandoned this appeal.

The instant litigation has spawned two separate appeals, each involving separate and distinct issues.

The instant appeal, based on the Act, seeks review of the Ninth Circuit's decision creating a new exception to the Act for actions under 42 U.S.C. § 1983. Petitioner immediately appealed from the issuance of the preliminary injunction. Sin:ultaneously, litigation of issues underlying Respondent's § 1983 claim proceeded through the district court.

The § 1983 issues are now before the Ninth Circuit, as a second appeal, challenging the district court's permanent injunction prohibiting petitioner from applying to Respondent a work rule which the court found unconstitutional. Respondent's brief is due to be filed at the Ninth Circuit on April 25, 1994.

Petitioner could not include the Norris-LaGuardia issue in the docketing statement, or brief, for the second appeal, because the Ninth Circuit had already decided the issue. *Reuter v. Skipper*, 4 F.3d 716 (9th Cir. 1993).

Far from abandoning the Norris-LaGuardia issue, Petitioner has vigorously pursued its resolution through timely appeal to the Ninth Circuit, petition for rehearing and suggestion for rehearing en banc (Pet. App. at B-1),

as well as the instant petition for writ of certiorari, at the same time it is litigating the underlying § 1983 action.[3]

3. This case is not moot.

Respondent is mistaken in asserting this case is moot. *Weinstein v. Bradford*, 423 U.S. 147 (1975), provides that where a challenged action is too brief in duration to be fully litigated prior to its cessation, and it is capable of repetition, the case is not moot.

In *Weinstein*, the Court found the case was moot because the prisoner challenging procedures for determining eligibility for parole had been released from supervision. The Court found that, although the petitioners would continue to administer the North Carolina parole system, there was no demonstrated probability that the respondent would ever be before the parole board again.

Here, as in *Weinstein*, Petitioner will continue to administer the Sheriff's Office. However, unlike *Weinstein*, Respondent and all other Corrections Officers remain subject to a work rule restricting their non-business contacts with former inmates. Indeed, the work rule in its various forms is the primary cause of litigation

---

[3] Respondent contends Petitioner abandoned the appeal of the preliminary injunction because there was not a direct appeal following the district court's October 12, 1993, declaratory judgment and permanent injunction. This is procedural hairsplitting. Petitioner timely appealed the district court's August 24, 1993, order granting summary judgment, on September 23, 1993. If the Ninth Circuit reverses that order, the permanent injunction will necessarily be vacated.

between Respondent and the Multnomah County Corrections Officers Association, on behalf of its members. When Reuter – or another Corrections Officer – again runs afoul of the workrule, this case will be repeated. When a preliminary injunction again issues, prohibiting Petitioner from administering discipline, it will again be of such short duration that the issue, of whether or not the Act prohibits an injunction in this type of labor dispute, will again evade review.

Indeed, for this exception to mootness to apply, Respondent need not be the only party affected by the probability of repetitive litigation evading review. In *Nebraska Press Association v. Stuart*, 427 U.S. 539 (1976), an order restraining publicity before a trial expired before the case challenging the constitutionality of the order was heard on appeal. Because the case involved important freedom of press issues, and state prosecutors in the future might seek similar pre-trial orders, the State of Nebraska intervened. The Court found that the dispute was capable of repetition, and not moot, despite the fact that only one particular judge, and not the State, was the named defendant.

Even though the union is not named in the present action, the reasonable expectation exists that the dispute, over whether Norris-LaGuardia prohibits preliminary injunctions against discipline of union members, will arise again between the union – or its members – and Petitioner. At the hearing on the preliminary injunction in this case, officers of Respondent's union testified that the work rule for which Respondent was being disciplined has been, and obviously continues to be, the subject of repeated litigation. Moreover, now that the district court

has once enjoined discipline based on violation of the work rule, it is all the more likely to be asked to do so again. Therefore, as in *Nebraska Press*, supra, this case is not moot.

Finally, in *International U., Auto., Etc. v. LaSalle Mach. Tool*, supra, in addition to finding that the appeal was alive because the issue of damages was still alive, the court found that the appeal was not moot because "the issue of the validity of the preliminary injunction would evade review." *Id.*, at 459. "When these circumstances exist the litigation is not moot." *Id.*[4]

---

[4] Respondent relies on *Cert. Grocers of Ill. v. Produce Etc., Un. Loc. 703*, 816 F.2d 329 (7th Cir. 1987) for the proposition that a preliminary injunction always merges into a permanent injunction (Respondent's Brief p. 8-9). This holding is in direct conflict with *Inter. U., United Auto., Etc. v. LaSalle Mach. Tool*, supra, and vitiates Respondent's argument that the instant case should not be accepted for review because there is no conflict between the circuits (Respondent's Brief p.11).

CONCLUSION

The Ninth Circuit's Opinion should be reviewed and reversed by this Court.

Dated: March 24, 1994.

Respectfully submitted,

STEVEN J. NEMIROW*
Assistant County Counsel
LAURENCE KRESSEL
Multnomah County Counsel
P.O. Box 849
Portland, Oregon 97202-0849
(503) 248-3138
Attorneys for Petitioners
*Counsel of Record